Supreme Court, U.S.
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No.

In the Supreme Court of the United States

STEPHEN S. ADAMS AND 14,302 OTHER SIMILARLY SITUATED PLAINTIFFS,

PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether legislation retroactively abrogating federal employees' meritorious wage claims against the United States for work already performed violates the Due Process Clause.

LIST OF PARTIES

Petitioners are Stephen S. Adams and 14,302 individuals who are current and former employees of the United States. The names of all petitioners were filed with the district court. Upon consultation with the clerk's office of this Court, petitioners do not list each petitioner's name. Should the Court require such information, petitioners will provide it forthwith.

The respondents are the United States of America, United States General Accounting Office (now called the "Government Accountability Office"), Richard J. Watkins (Assistant Director, Bureau of Alcohol, Tobacco, and Firearms), the Bureau of Tobacco, Alcohol and Firearms, Retha M. Fulmore (Deputy Assistant Administrator, Office of Personnel, Drug Enforcement Administration), the Drug Enforcement Agency, Darlene Berthod (National Director of Personnel, Internal Revenue Service), the Internal Revenue Service, John P. Helm (Assistant Chief Counsel (Administration), United States Customs Service), the United States Customs Service, Susan T. Tracey (Chief, Personnel Division, United States Secret Service), the United States Secret Service), the United States Department of Justice, the United States Department of the Treasury, and the Office of Personnel Management.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 946 F. Supp. 37. Pet. App. 12a-28a. The District Court denied petitioners' motion for reconsideration in an unpublished order and memorandum of law. Pet. App. 29a-30a, 31a-37a. The opinion of the D.C. Circuit is reported at 154 F.3d 420. Pet. App. 1a-11a. The D.C. Circuit denied petitioners' petition for rehearing *en banc* on November 9, 1998. Pet. App. 1a. Certiorari was denied at 526 U.S. 1158.

The District Court then transferred the case (with petitioners' then-unresolved Takings claims) to the Court of Federal Claims. The opinion of the Court of Federal Claims is unreported. The opinion of the Federal Circuit, issued December 9, 2004, is reported at 391 F.3d 1212.

JURISDICTION

Petitioners have filed a separate petition simultaneously with this one, which is addressed to the most recent decision in this case: an opinion by the Federal Circuit on December 9, 2004 resolving petitioners' Takings claims. This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

Petitioners' related Due Process claims were decided earlier by the D.C. Circuit in this same action, prior to its transfer to the Court of Federal Claims. This Court has jurisdiction over the Due Process issues as well because, under settled law, an otherwise timely petition for certiorari may raise any issues decided earlier in the case. *See, e.g., Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (*per curiam*) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of

the judgments of the Court of Appeals."); *Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (*per curiam*); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258-59 (1916). The circumstance that this case was transferred from one lower court to another should not deprive this Court of jurisdiction to review all of the important constitutional questions decided throughout the litigation. That would be an arbitrary limitation on this Court's power to defer review until all the issues have been resolved by the lower courts.[1]

The earlier transfer does, however, raise a novel question about the proper form for seeking this Court's review. Commentators suggest that "a single petition for certiorari may not be filed with respect to separate judgments entered by separate courts below, no matter how identical or related may be the questions involved." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 400 (8th ed. 2002). Petitioners have thus been unable to determine whether the correct course in these circumstances is to raise all of the issues in one petition challenging the most recent decision in the case, or instead to file two separate petitions and suggest that they be consolidated for argument. After consultation with the Clerk's Office, and out of an abundance of caution, petitioners have elected to do both.

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[1] Petitioners filed a petition for certiorari addressed to the D.C. Circuit's decision at the time, which was denied. *See* 526 U.S. 1158 (1999). Of course this Court may have denied review then precisely because it prefers not to review interlocutory decisions. The Federal Circuit's resolution of the Takings issues might, for example, have rendered the Due Process issues moot and made this Court's review unnecessary.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the provisions of the Fifth Amendment, of Section 640 of the 1995 Treasury, Postal Service and General Government Appropriations Act, Pub. L. No. 103-329, 108 Stat. 2382, 2432 (1994), and of Public Law No. 104-52, 109 Stat. 468, 468–69 (1995), involved in this case. Pet. App. 38a-39a.

STATEMENT OF THE CASE

This petition is a companion to one filed simultaneously that is addressed to a recent Federal Circuit decision resolving petitioners' Takings claims. Petitioners respectfully request that this Court review that other petition first. The Federal Circuit's Takings analysis raises extremely important and complex issues, and clearly merits this Court's review.

The D.C. Circuit held earlier in this case that retroactive legislation abrogating the United States' obligation to pay wages to its own employees, for work already performed, satisfied Due Process because it had a rational basis. That holding constitutes a serious error that merits review by this Court. Having the Due Process issues before it will facilitate this Court's consideration of the broader jurisprudential issues raised by this case.

1. Factual Background

The following factual summary is (until the description of the proceedings below) identical to the one contained in the separate Takings petition, but is reproduced here for the Court's convenience. Because the District Court and D.C. Circuit resolved the Due Process issues as a matter of law on the government's motion for judgment on the pleadings,

Pet. App. 7a, the well-pled allegations of petitioners' complaint must be accepted as true.

In 1974, Congress extended the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 ("FLSA"), to the federal government, expressing its conviction that when the United States acts as an employer it should generally be bound by the same regime it imposes on private sector employers.[2] The government thereafter resisted that mandate by adopting a broad interpretation of the statutory exemptions for "bona fide executive, administrative, or professional" employees (*see* 29 U.S.C. § 213(a)(1)) to deny FLSA overtime pay to large classes of federal employees. After years of litigation it is now clear that the United States' position was, in large measure, unlawful—and that many of its employees, including petitioners, were wrongly deprived of overtime compensation they were entitled to.[3]

Petitioners worked as criminal investigators and in other positions for the United States Secret Service, the United States Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration, the Internal Revenue Service, and other federal agencies. For many years, the United States failed

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[2] *See* Pub. L. No. 93-259, 88 Stat. 55, 58–62 (1974) (pertinent part codified at 29 U.S.C. § 203(e)(2)(A) (1988)); S. Rep. No. 93-690, at 1–2 (1974); H.R. Rep. No. 93-913, at 9 (1974), 1974 U.S.C.C.A.N. 2811, 2819.

[3] *See, e.g., Adams v. United States*, 27 Fed. Cl. 5 (1992), *rev'd in part and remanded*, 178 F.3d 1306, 1998 WL 804552 (Fed. Cir. 1998) (unpublished decision); *Berg v. Newman*, 982 F.2d 500 (Fed. Cir. 1992), *on remand sub nom. Berg v. United States*, 49 Fed. Cl. 459, 478 (2001) (finding that the United States "has not carried its burden of demonstrating that the plaintiffs were exempt from the overtime pay provisions of the [FLSA]"); *Am. Fed'n of Gov't Employees v. Office of Personnel Mgmt.*, 821 F.2d 761, 769–71 (D.C. Cir. 1987).

to pay them the overtime compensation they were due, because it erroneously classified them as FLSA-exempt.

Commencing February 1990, petitioners filed administrative claims with the General Accounting Office ("GAO") to recover the back overtime compensation that the United States owed them. Consistent GAO and Office of Personnel Management ("OPM") precedent stretching back to 1978 established that the Barring Act's six-year statute of limitations governed petitioners' administrative claims.[4] Because a separate FLSA claim accrues each pay period, petitioners expected to recover six years of back overtime pay through GAO's administrative process. Petitioners also simultaneously filed actions in the COFC, which were consolidated and styled *Adams v. United States*, No. 90-162C, and consolidated cases ("*Adams I*"). The statute of limitations applicable to those judicial claims was two years, or three years if the violations were willful. 29 U.S.C. § 255(a). GAO stayed petitioners' administrative claims pending the outcome of the *Adams I* litigation in the COFC. Petitioners' First Amended Complaint ("Complaint") ¶ 11, JA25.[5]

On cross-motions for summary judgment in late 1992, the COFC held that the GS-9 and GS-11 criminal investigators at all of the above-listed agencies and the GS-12 investigators at the Customs Service, were non-exempt and therefore entitled to recover back wages under the FLSA. *Adams v. United States*, 27 Fed. Cl. 5, 28–29 (1992). The COFC held that the GS-13 criminal investigators, and

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[4] *See, e.g., In re Transp. Sys. Ctr.*, 57 Comp. Gen. 441 (1978); *see also In re Tomkowiak*, 67 Comp. Gen. 247 (1988); *In re Fed. Firefighters*, 68 Comp. Gen. 681 (1989); *accord* Federal Personnel Manual ("FPM") Letter 551-15 (1978) (announcing OPM's adoption of six-year limitations period).

[5] JA citations refer to the joint appendix filed in the Federal Circuit.

the GS-12 criminal investigators at every agency except the Customs Service, were FLSA-exempt. *Id.* at 29. The Federal Circuit vacated the latter ruling, see *Adams v. United States*, 178 F.3d 1306, 1998 WL 804552 (Fed. Cir. 1998) (unpublished decision), and remanded to the COFC.[6]

In March 1994, the Justice Department entered into settlement agreements with the petitioners whose entitlement to FLSA overtime had been established by the COFC. Those settlements gave each entitled employee two years of back overtime pay, without prejudice to their administrative claims still pending before GAO, which sought an additional four years of back wages consistent with the longer administrative statute of limitations. Complaint ¶ 13, JA25–26. Petitioners then requested a meeting with GAO "to discuss how to achieve a prompt resolution" of their pending administrative FLSA claims. *Id.* ¶ 14, JA26.

Instead, a week later, the Comptroller General overruled 16 years of settled GAO precedent and held that the statute of limitations for administrative FLSA claims was two years, not six. *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994). The Comptroller General also held that the shorter period would be applied retroactively to all cases then pending before GAO. *Id.* at 161–62.

Congress recognized the patent unfairness of GAO's retroactive application of *Ford*, and partially overruled it by statute. Section 640 of the 1995 Treasury, Postal Service and General Government Appropriations Act, Pub. L. No. 103-329, 108 Stat. 2382, 2432 (1994) ("Section 640"), which became law on September 30, 1994, provided that "the

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[6] On December 1, 2004, the COFC granted the motion for summary judgment as to liability filed by the GS-13 criminal investigators. *Adams v. United States*, No. 90-162C (Fed. Cl. Dec. 1, 2004) (unpublished).

Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201) for claims filed before June 30, 1994." Congress thus recognized that GAO's two-year statute of limitations should not be applied retroactively to claims pending when *Ford* was decided.

When petitioners renewed their efforts to resolve their administrative claims, GAO acknowledged that Section 640 had "modified our *Ford* decision to allow Federal employees to claim an entitlement to FLSA overtime for an additional four years, provided a claim was filed before June 30, 1994." *See* Complaint ¶ 21, JA28. GAO insisted, however, that its "regulations require that the agency from which the claim originated shall initially adjudicate the claim." *See id.*, JA28–29. Petitioners accordingly asked the relevant agencies to resolve the back pay claims. *Id.* ¶ 23, JA29–30. On January 27, 1995, the Deputy Assistant General Counsel of the Department of the Treasury circulated a memorandum concluding that Section 640 "gives specific authority to apply a six-year statute of limitations exclusively to the Comptroller General," not to the agencies themselves. *See id.* ¶ 24, JA30–31. By May 9, 1995, all of the relevant agencies had denied petitioners' claims on that ground. *Id.* ¶¶ 25–26, JA31.

By May 12, 1995, petitioners had appealed all of those agency decisions back to GAO under 4 C.F.R. § 31.4. Rather than act upon these indisputably meritorious appeals, however, GAO stalled to give the interested agencies time to lobby Congress for legislation extinguishing petitioners' back pay claims. It simply did not respond to petitioners' letters (*see* Complaint ¶¶ 31, 33, JA34, 35), and counsel for GAO declared in another pending, similar case that GAO

"does not intend to issue a decision . . . until the Treasury-Postal Service and General Government Appropriations Bill, 1996 . . . is enacted (because of the possible retroactive repeal of § 640 . . .)." Complaint ¶ 31, JA34. Various high-ranking government officials lobbied for the repeal of Section 640, *id.* ¶¶ 28–29, JA33, and the Treasury Department submitted proposed statutory language for Congress's consideration, *id.* ¶ 36, JA36.

Those efforts bore fruit on November 19, 1995, when Congress enacted Public Law No. 104-52, 109 Stat. 468, 468–69 (1995). This legislation amended Section 640 to provide that GAO's six-year statute of limitations "shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. § 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station." The 1995 statute reduced the administrative statute of limitations for practically all pending federal employee FLSA claims to two years—eliminating the government's obligation to pay four additional years' backpay—because the vast majority of entitled employees had received *some* compensation for their overtime hours under other provisions of law (at, or in many cases below, their regular hourly rate—not the time-and-a-half guaranteed by the FLSA) or were entitled to compensation for time they were required to spend driving to and from work in a government vehicle.[7]

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[7] Employees were entitled to compensation for this time when they were required to drive a government vehicle to and from work in order to be able to respond promptly to emergencies. *See* FPM Letter 551-10 (1976). They could drive such vehicles only for official purposes. *See, e.g.*, 31 U.S.C. §§ 1344, 1349(b); 41 C.F.R. § 101-38.301 (1998).

When Representative Lightfoot introduced the 1995 statute, he explained that without some change in the law the United States would owe its employees "as much as $460 million . . . for work done many years ago." 141 Cong. Rec. 32597 (1995). Representative Lightfoot justified the United States' repudiation of its debts to its employees by proclaiming that the bill would simply "give the Federal workers the same rights [i.e., a two-year statute of limitations] as their private sector counterparts." *Id.* (He did not acknowledge the trenchant difference that obviously motivated Congress in 1994—that federal employees, unlike their counterparts in the private sector, had long been on express notice from GAO and OPM that they had six years, rather than two, in which to assert their rights.)

2. Procedural History

Petitioners originally filed this action in the United States District Court for the District of Columbia. The District Court affirmed GAO's holding in *Ford* that the administrative statute of limitations for FLSA overtime claims before the 1994 enactment of Section 640 was two, not six, years. It recognized, however, that by restoring the six year statute of limitations the 1994 legislation validated petitioners' protected property interests in their unpaid overtime compensation, and that Congress could not necessarily "extinguish [those property interests] merely by passing new legislation." Pet. App. 20a. The District Court expressly disagreed with a pair of earlier Ninth Circuit cases holding that "[w]hen . . . the statute authorizing the benefit is amended or repealed, the property right disappears." *Id.* at 18a (*quoting Jones v. Reagan*, 748 F.2d 1331, 1338 (9th Cir. 1984); *see also Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1435 (9th Cir. 1988)).

The District Court held, however, that petitioners' property rights could be extinguished by the retroactive 1995 legislation so long as it had "a legitimate legislative purpose furthered by rational means." Pet. App. 15a (*quoting General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)). The District Court noted that if the purpose of the statute was "merely about saving money," then its legitimacy would be a "difficult question." Pet. App. 21a. The court focused on Representative Lightfoot's suggestion that the purpose of amended Section 640 was in part to "put federal workers in the same position as private sector workers." Pet. App. 21a. The court concluded that Congress's 1995 retroactive elimination of petitioners' claims was permissible under the Due Process Clause because it rationally furthered the legitimate purpose of equalizing the statutes of limitations governing FLSA claims by federal and other employees. Pet. App. 23a. The District Court also found that the 1995 law met the three-part regulatory Takings test of *Penn Central*. Pet. App. 24a-25a.

The D.C. Circuit affirmed the dismissal of petitioners' Due Process claims for the reasons stated by the District Court. Pet. App. 7a. The D.C. Circuit held that it lacked jurisdiction over petitioners' Takings claims, however. *Id.* at 9a-10a. Although the D.C. Circuit acknowledged this Court's decision in *Eastern Enterprises*, which had just been announced, it analyzed the consequences of that decision only for the narrow jurisdictional question—and did not discuss how *Eastern Enterprises* might bear on the

merits of the Due Process issues.[8] On remand, the District Court transferred this case to the COFC.

After transfer, the COFC and the Federal Circuit denied petitioners' Takings claims for reasons explained in greater detail in the other petition filed today. For present purposes it suffices to note that the Federal Circuit's reasoning was based largely on its conclusion that the concurring opinion of Justice Kennedy in *Eastern Enterprises*, read together with the dissenting opinion authored by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, required that statutes imposing monetary obligations on private parties be analyzed only under the Due Process Clause. The Federal Circuit reasoned that laws *nullifying the Government's own obligations to private parties* raise similar issues, and therefore should be analyzed only under the Due Process Clause as well.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit held that the 1995 statutory amendments at issue here satisfied Due Process because they had a legitimate purpose (equalizing the statutes of limitations for FLSA claims by private sector and federal employees) and because the means selected (retroactively revoking the longer limitations period previously enjoyed by federal employees) achieved that goal. That might be defensible if the ordinary Due Process "rational basis" test applied in these circumstances.

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[8] Petitioners filed a petition for certiorari at that time that focused on the merits of the GAO's decision in *Ford*. That petition was denied. 526 U.S. 1158 (1999).

The ordinary rational basis test should not, however, have been applied here. In *Eastern Enterprises* five Justices of this Court—Justice Kennedy and the four dissenters—clearly expressed the view that retroactive legislation must not only be *rational*, but also *fundamentally fair*, to satisfy Due Process scrutiny. When the plurality's very similar Takings analysis is considered, this Court in fact unanimously concluded that retroactive legislation must meet a higher constitutional standard than rational basis review. Yet because this Court's resolution of *Eastern Enterprises* produced no holding on a single rationale, the D.C. Circuit was free to ignore it.

After transfer, the Federal Circuit counted heads in *Eastern Enterprises* and concluded that five Justices (again, Justice Kennedy and the dissenters) believed that laws imposing monetary obligations on private parties should be reviewed under the Due Process Clause rather than the Takings Clause. The Federal Circuit reasoned that a law, like this one, which abrogates the government's *own* financial obligations is also immune from Takings scrutiny. But the Federal Circuit did not apply the heightened Due Process review that those same five Justices had required in *Eastern Enterprises*, and that was integral to their conclusion that separate Takings review was unnecessary. The COFC and Federal Circuit lack jurisdiction over Due Process claims. *See United States v. Mitchell*, 463 U.S. 206, 216-17 (1983).

That is an egregious whipsaw, and a textbook example of how parsing out separate hypothetical majorities on abstract questions from this Court's opinions can produce a result that every member of this Court would reject. The effective law is now that federal laws altering or imposing

monetary obligations may be reviewed only under the Due Process Clause, and that the appropriate test under that Clause is merely rational basis review. In other words, the law at issue in *Eastern Enterprises* would itself be reviewed by the lower courts only for minimum rationality—a position this Court unanimously rejected there.

Rational basis review was inappropriate in this case for two additional reasons. This Court has held that laws retroactively shortening statutes of limitations are *per se* Due Process violations unless they provide a grace period in which previously accrued claims may be filed. This statute did not. This Court's precedents also indicate that the deference to legislative judgments implicit in the ordinary rational basis test is inappropriate when a statute modifies the United States' own proprietary obligations—and that laws abrogating the United States' debts are thus also *per se* unconstitutional. This case violates that rule as well.

Both the Due Process and Takings issues in this case merit this Court's review. As *Eastern Enterprises* demonstrates, those issues are clearly related. This Court could certainly review the Takings issues in isolation; indeed, petitioners believe that the best way to reconcile Due Process and Takings law in this area would be to hold that laws of the sort at issue here are *per se* Takings. But petitioners respectfully submit that having all of the issues before it would facilitate this Court's consideration.

This Court should therefore grant review of both the Due Process and Takings issues, either by granting the separate petition addressed to the Federal Circuit, or by granting both petitions and consolidating them for argument.

I. THE D.C. CIRCUIT'S DUE PROCESS ANALYSIS IS INCONSISTENT WITH VIEWS EXPRESSED BY EVERY JUSTICE IN *EASTERN ENTERPRISES*

The 1995 statute at issue nullified petitioners' entitlement to four years of unpaid back overtime pay by retroactively shortening the statute of limitations from six years to two. The D.C. Circuit agreed with the District Court that the statute was consistent with Due Process because it pursued "a legitimate legislative purpose . . . by rational means." Pet. App. 8a, 20a (*quoting Romein*, 503 U.S. at 191). The courts reasoned that Congress might have intended to equalize the statutes of limitations governing FLSA overtime claims asserted by private and public employees, and that this was a rational means to that end.

That analysis is reasonable as far as it goes. The problem with this statute's retroactive impact is not that it is *irrational*, in the ordinary sense of a disconnect between means and ends, but that it is substantively *unfair*. The Due Process precedents relied upon by the District Court and D.C. Circuit strongly suggest, although without any square holding, that mere rationality is insufficient when legislation has a substantial retroactive effect.[9]

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[9] In *Pension Benefit Guar. Co. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984), for example, this Court approved retroactivity that was designed "to prevent employers from *taking advantage* of a lengthy legislative process . . . while Congress debated necessary revisions in the statute." (emphasis added). In *United States v. Sperry Corp.*, 493 U.S. 52, 64-65 (1989), this Court noted that "[i]f Congress had made the application of §502 prospective only, the costs of the Tribunal would have fallen *disproportionately* on the claimants whose awards . . . were delayed, and Congress might have had to increase the percentage charge on those claimants to recoup a sufficient portion of the Federal Government's

The problem with the D.C. Circuit's analysis (or perhaps more precisely, with the interaction between the D.C. Circuit's reasoning and the Federal Circuit's in this case) is dramatically illustrated by this Court's decision in *Eastern Enterprises*, which was issued shortly before the D.C. Circuit's opinion. The D.C. Circuit acknowledged *Eastern Enterprises*, but concluded that it did not alter the legal principles governing this case—and indeed has since held that *Eastern Enterprises* contains no binding holding. *See Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255 (D.C. Cir. 1998) ("[T]he only binding aspect of *Eastern Enterprises* is its specific result -- holding the Coal Act unconstitutional as applied to Eastern Enterprises."). But although this Court did not agree on a binding rationale in *Eastern Enterprises*, it did agree *unanimously* that the Fifth Amendment requires more from retroactive legislation than a rational basis—and specifically that it requires a searching inquiry into the fundamental fairness of the burdens imposed by a law.

Explaining why requires some background on *Eastern Enterprises*. It involved both Due Process and Takings challenges to the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"). The petitioner in *Eastern*

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costs." (emphasis added). *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976), held that "the imposition of liability for the effects of disabilities bred in the past is *justified* as a rational measure to spread the costs of the employees' disabilities to those who have *profited* from the fruits of their labor—the operators and the coal consumers." (emphases added). And this Court held that the law in *Romein* was constitutional because "it *equalized* the payments made by employers who had gambled on the *Chambers* decision with those made by employers who had not." 503 U.S. at 191. The test actually articulated in these cases, however, is the ordinary rational basis standard.

Enterprises had been in the coal mining business, and had participated in multi-employer health benefits plans financed by royalties on coal and by payroll deductions. 524 U.S. at 505. These benefit plans did not specify a particular amount of benefits to which participants were entitled, and did not guarantee lifetime health benefits for retirees. *Id.* at 506, 508. Rather, the amount of benefits were determined by trustees who adjusted benefits based on the budgetary constraints of the plans. *Id.* at 507. In 1965, Eastern transferred its coal business to a subsidiary, and in 1987 it exited the coal business entirely. *Id.*

In 1974 certain coal companies and the mine workers' union reached a new agreement for a benefit plan that, for the first time, provided health benefits for retirees. *Id.* at 509. However, Eastern was not a signatory to this agreement and did not participate in that plan. *Id.* at 530.

When the new health plan experienced a funding crisis, Congress passed the Coal Act to bail it out—and to extend the plan to all coal industry retirees, whether or not their employers had participated originally. The Coal Act's purpose was to "allow for the provision of health care benefits to . . . retirees" who had worked in the coal industry. *Id.* at 514. It forced Eastern to pay the health benefits premiums for any coal retirees who, prior to 1978, had been employed by Eastern longer than any other company—even though Eastern had not been a signatory to any agreement that promised health benefits for retirees. *Id.* at 515, 530. Eastern's cumulative payments under the Coal Act were estimated to be between $50 and $100 million. *Id.* at 529. Eastern argued that the Coal Act violated both the Due Process and Takings Clauses.

This Court held the Coal Act unconstitutional in a divided decision. A plurality opinion authored by Justice O'Connor (and joined by the Chief Justice, Justice Scalia, and Justice Thomas) concluded that the Coal Act violated the Takings Clause. Justice O'Connor reasoned that a law that "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability," is a regulatory Taking if "the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29 (plurality op.).

Justice Kennedy concurred in the judgment, concluding that the Coal Act violated the Due Process Clause. Justice Kennedy noted that "[w]hile we have upheld the imposition of liability on former employers based on past employment relationships, the statutes at issue were remedial, designed to impose an 'actual, measurable cost of [the employer's] business' which the employer had been able to avoid in the past.'" *Id.* at 549 (Kennedy, J., concurring) (quoting *Turner Elkhorn*, 428 U.S. at 19). Justice Kennedy rejected the notion that the Coal Act furthered any remedial purpose, noting that Eastern "was not responsible for [the retirees'] expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy." *Id.* at 550.

On the Takings question, Justice Kennedy reasoned that because the constitutionality of the Coal Act ultimately turned on a "normative judgment" about whether it was fundamentally fair to impose these costs on Eastern, the regulatory Takings standard would essentially duplicate the fairness-centered Due Process test that he articulated. *Id.* at 545. Justice Kennedy suggested that "[the Court] should proceed first to general due process principles, reserving

takings analysis for cases where the governmental action is otherwise permissible." *Id.* at 546.

Justice Breyer authored a dissent, which was joined by Justices Stevens, Souter, and Ginsburg. Like Justice Kennedy, the dissenters read this Court's Due Process precedents like *Romein* and *Turner Elkhorn* to require scrutiny of the statute's fairness in addition to its rationality. "[A] law that is fundamentally unfair because of its retroactivity is a law which is basically arbitrary." *Eastern Enterprises*, 524 U.S. at 557 (Breyer, J., dissenting). Justice Breyer continued that "[t]o find that the Due Process Clause protects against this kind of fundamental unfairness—that it protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means—is to read the Clause in light of a basic purpose: the fair application of law, which purpose hearkens back to the Magna Carta." *Id.* at 558. The dissenters concluded, however, that the Coal Act itself was not fundamentally unfair.

Like Justice Kennedy, the dissenters also reasoned that the basic constitutional "question involved—the potential unfairness of retroactive liability—finds a [more] natural home in the Due Process Clause" than the Takings Clause. *Id.* at 556. Since "the Due Process Clause can offer protection against legislation that is unfairly retroactive at least as readily as the Takings Clause might," the dissenters suggested that regulatory laws imposing monetary liability on one private party to another private party should be analyzed only under the Due Process Clause. *Id.* at 557.

Although the various opinions in *Eastern Enterprises* disagreed about whether the case should be analyzed as a Due Process or Takings issue, they displayed remarkable

unanimity on the substance of the appropriate standard. The plurality's regulatory Takings analysis and the Due Process standard articulated by Justice Kennedy and the dissenters all turned, ultimately, on whether the retroactive burdens imposed by the law were fundamentally fair in light of Eastern's past relationship to the problem Congress was seeking to address. No Justice believed that the Coal Act could be constitutional merely because it "had a legitimate legislative purpose which was furthered by rational means." Under that standard, *Eastern Enterprises* would have been an easy case. Congress' stated intention for the Coal Act, providing health benefits to coal industry retirees, was certainly legitimate. And the means Congress chose to achieve its objective, imposing financial liability on former employers of the retirees, was a rational (although arguably unfair) way to achieve that goal.

Petitioners respectfully submit that if the D.C. Circuit had applied the test articulated by Justice Kennedy and the dissenters in *Eastern Enterprises*, it would have concluded that the 1995 statute at issue here violates Due Process. This statute was not remedial in any sense, because petitioners did not owe anything to the United States that called for compensation. In the same vein petitioners were not responsible for the problems that the D.C. Circuit thought the 1995 statute was designed to solve. (It is not petitioners' fault that the United States is short of funds. It is not their fault that Congress and the GAO had previously thought it appropriate to have a longer limitations period for federal employees than for private sector employees. And it is the *government's* fault that petitioners were deprived of the pay to which they were lawfully entitled in the first instance.) The effect of the 1995 Amendment was

undoubtedly severe, in that it nullified a lawful debt owed by the United States to petitioners for unpaid wages that, according to Representative Lightfoot (as stated during the debate regarding Amended Section 640) exceeds $460 million. 141 Cong. Rec. 32597 (1995). The 1995 Amendment therefore represents "an unfair allocation of public burdens through . . . . specially arbitrary retroactive means," and violates Due Process under the standards articulated by Justice Kennedy and Justice Breyer in *Eastern Enterprises*. 524 U.S. at 558 (Breyer, J., dissenting).[10]

Unfortunately, *Eastern Enterprises* contains no holding of this Court. Justice Kennedy's concurrence does not state any narrowest common ground of agreement with the plurality on a specific rationale, and the agreement between Justice Kennedy and the dissenters on the appropriate Due Process test is not precedential because the dissenters did not concur in the judgment. *See Marks v. United States*, 430 U.S. 188 (1977). The D.C. Circuit was therefore correct to believe it was not bound by *Eastern Enterprises*, and most lower courts have concluded likewise. (The circuit split on that issue is catalogued in petitioners' other petition, at 22 n. 21). But the consequence of that jurisprudential circumstance is that a statute imposing severe retroactive burdens was reviewed by the D.C. Circuit under a Due Process test that at least five Justices of this Court have squarely rejected—and that, in light of the plurality's Takings analysis in *Eastern Enterprises*, this Court might well unanimously reject.

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[10] *See also, e.g., United States v. Carlton*, 512 U.S. 26, 38 (1994) (O'Connor, J., concurring) (noting that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions.").

The lower courts are therefore trapped between the stated views of five Justices and this Court's stern warning that the lower courts must not anticipate the overruling of Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).[11] This Court should grant review to clarify that severely retroactive laws must be fundamentally fair, not merely rational.

II. STATUTES RETROACTIVELY SHORTENING LIMITATIONS PERIODS OR ABROGATING THE GOVERNMENT'S DEBTS ARE NOT SUBJECT TO RATIONAL BASIS REVIEW

Eastern Enterprises suggests that laws imposing substantial retroactive burdens require more searching review and analysis under the Due Process Clause than is available under the rational basis test. But even leaving that broader principle aside, mere rational basis review does not apply here for two additional reasons.

First, on numerous occasions this Court has held that laws retroactively imposing or shortening statutes of limitations (precisely what amended Section 640 did in this case) are essentially *per se* violations of Due Process unless they provide a reasonable prospective grace period in which claimants who would otherwise be barred can file their

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[11] In *Eastern Enterprises* Justice Kennedy and Justice Breyer found support for their fundamental fairness analysis in the reasoning of prior decisions of this Court such as *Romein* and *Turner Elkhorn*. The test actually articulated in those earlier cases was, however, ordinary rational basis review. While this Court need not overrule those earlier cases in order to announce a more stringent test for laws imposing severely retroactive burdens, the lower courts do not feel free (even after *Eastern Enterprises*) to read those cases in a manner that deviates from ordinary rational basis review.

claims.[12] That rule is obviously motivated by fairness rather than rationality concerns—and alone suffices to demonstrate the D.C. Circuit's error.

Second, this Court has shown substantial deference to the legislative branch when reviewing statutes that "adjust[] the burdens and benefits of economic life," and has presumed such laws to be constitutional unless they are "arbitrary and irrational." *Turner Elkhorn*, 428 U.S. at 15. But such deference is inappropriate where the government departs from its sovereign role as a neutral arbiter of economic life and instead legislates in a manner that exclusively benefits its own proprietary interests as an employer. In such cases, the government is a self-interested party, and its actions must be subjected to more rigorous judicial scrutiny than the rational basis test provides.

This Court has held under the Contracts Clause that "deference to a legislative assessment of reasonableness and necessity is not appropriate [when] the State's self-interest is at stake." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977). And "[f]or similar reasons" it applied "a dual standard of review . . . under the Fifth Amendment to federal legislation abrogating [the federal government's own] contractual gold clauses," *id.* at 26 n.25, in *Perry v. United States*, 294 U.S. 330 (1935). This Court held in *Perry* that "[t]here is a clear distinction between the

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[12] *See, e.g., Ochoa v. Hernandez Y. Morales*, 230 U.S. 139, 161-62 (1913); *Atchafalaya Land Co. v. F.B. Williams Cypress*, 258 U.S. 190, 196-97 (1922); *Block v. North Dakota E. Rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 286 n.23 (1983); *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982). Thus, when the Barring Act reduced the limitations period for claims filed with GAO it provided a six month transition period. *See* Pub. L. 93-604 § 802, 88 Stat. 1959, § 2.

power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own agreements." 294 U.S. at 350-51. *Perry* and its companion case, *Lynch v. United States*, 292 U.S. 571 (1934), held that it is a *per se* violation of the Fifth Amendment for the United States to abrogate its own debts, no matter how compelling its reason. And most recently in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), this Court made clear that the government loses its sovereignty-related contract law defenses "where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations."[13]

There can be no doubt that the government acted as a self-interested party rather than as a neutral economic arbiter when it passed amended Section 640 in 1995. As the District Court conceded in this case, Pet. App. 21a-22a, a large part (at least) of the government's motivation for that

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[13] The quoted language is from the plurality opinion in *Winstar*, at 518 U.S. at 898; *see also id.* at 899 ("a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations . . . ."). Concurring Justices Scalia, Kennedy and Thomas would almost certainly endorse the same principle, but frame the issue in terms of the parties' likely intent when contracting. Those Justices recognized that the reasonable presumption is that "the sovereign does *not* promise that none of its multifarious sovereign acts, needful for the public good, will incidentally disable it or the other party from performing one of the promised acts." 518 U.S. at 920–21 (Scalia, J., concurring). But another equally reasonable presumption is that the government has not reserved the right to abrogate particular contracts by specific, targeted legislation. Any other conclusion would be inconsistent with *Lynch* and *Perry*—as Justice Scalia observed. *Id.* at 924 (Scalia, J., concurring).

statute was to permit the United States to avoid the burden of having to pay its lawful debts to federal employees for the work they had already performed. Although the government contends that it also acted in part to equalize the rights of public and private sector employees, a plausible regulatory purpose is not enough to save a statute from more searching review when, as here, the statute serves substantially (indeed, in this case, *entirely*) to relieve the government of its own obligations.

Petitioners respectfully submit that the best way for this Court to resolve this case, and to harmonize Takings and Due Process jurisprudence in this area, would be to hold that a law abrogating the government's private debts is a *per se* Taking, for the reasons described in the petition to the Federal Circuit filed simultaneously herewith. But if this Court were to accept the Federal Circuit's view that laws altering or imposing monetary obligations may be reviewed only under the Due Process Clause, it should hold that this law violated Due Process: (a) because its retroactive impact on petitioners was fundamentally unfair, (b) because it retroactively shortened a statute of limitations without providing a reasonable grace period, and/or (c) because it nullified the government's own lawful debts to its employees, for work already performed. The D.C. Circuit's holding that a mere *rational basis* is sufficient to uphold such a law is inconsistent with the basic values embodied in the Fifth Amendment, and harms the United States' own long-run economic interests. *See, e.g.*, *Winstar*, 518 U.S. at 884 (plurality op.) (noting that any rule that "expand[s] the Government's opportunities for contractual abrogation" will have the "certain result of undermining the Government's

credibility at the bargaining table and increasing the cost of its engagements.").

III. HAVING BOTH THE DUE PROCESS AND TAKINGS ISSUES BEFORE IT WILL AID THIS COURT'S CONSIDERATION

Because the Federal Circuit has wrongly concluded that *Eastern Enterprises* permits the government to nullify its own debts without compensation so long as it complies with Due Process, the Due Process and Takings issues in this case have become, to some extent, intertwined. This Court could certainly review the Takings issues in isolation, and petitioners believe that this case should be decided on Takings grounds. But having all of the issues before it would aid this Court's consideration of the broader jurisprudential questions, and ensure that the individual litigants here will obtain relief under whichever theory this Court determines to be appropriate.

Indeed, the interaction between the Due Process and Takings holdings in this case illustrates the urgent need for this Court's intervention. The D.C. Circuit, like almost all the lower courts, has concluded that *Eastern Enterprises* contains no binding holding that could modify the traditional rational basis test under the Due Process Clause. But the Federal Circuit, which has exclusive jurisdiction over substantial Takings claims against the United States, has concluded that *Eastern Enterprises* exempts a broad and rapidly expanding class of statutes—essentially any statute altering or imposing financial obligations—from any form of Takings scrutiny. The net result is that if the Coal Act were challenged in the lower courts tomorrow, it would be subjected to nothing more searching, under either Clause,

than rational basis Due Process review. This Court rejected that position *unanimously* in *Eastern Enterprises*.

CONCLUSION

Either the separate petition addressed to the Federal Circuit should be granted in its entirety, or both petitions should be granted and consolidated for argument.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5121

STEPHEN S. ADAMS, et al.,

Appellants,

v.

JAMES F. HINCHMAN, Acting Comptroller General of the United States General Accounting Office, et al.,

Appellees.

Argued: March 12, 1998.
Decided: Aug. 28, 1998.
Rehearing Denied: Nov. 9, 1998.

Before RANDOLPH, ROGERS, and TATEL, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's judgment rejecting the claims of 14,122 current and former federal criminal investigators or other law enforcement officers. The plaintiffs were employed between 1984 and 1995 in federal agencies such as the Customs Service, the Secret Service, the Internal Revenue Service, the Drug Enforcement Agency and the Bureau of Alcohol, Tobacco and Firearms.[1] Between February 16, 1990, and December

[1] The original defendants were then Comptroller General of the General Accounting Office, Charles A. Bowsher, and the heads of the various federal agencies. On September 30, 1996, Mr. Bowsher retired.

13, 1995, they filed civil actions in the Court of Federal Claims alleging that they had been wrongfully classified as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* During the same period, each employee also filed an administrative claim at the Government Accounting Office. Of the 14,122 employees, 11,247 brought suit before June 30, 1994.

In a consolidated case, the Court of Federal Claims held that certain grades of employees—namely, GS-9 and GS-11 investigators at BATF, DEA, IRS, and Secret Service, and GS-9 investigators at Customs Service—were not exempt from FLSA, and thus had been entitled to overtime pay. *Adams v. United States*, 27 Fed. Cl. 5 (1992). On March 16, 1994, these plaintiffs entered into settlement agreements with the United States. The agreements gave the plaintiffs "back pay and interest ... for the two-year period prior to the date that each such plaintiff filed suit" but did not prejudice their rights to pursue administrative remedies. Counsel then corresponded with the GAO regarding the pending administrative claims.

The authority of the GAO to settle claims against the United States is found in the Barring Act, 31 U.S.C. § 3702.[2] According to the GAO, "to settle a claim means to administratively determine the validity of that claim .... Settlement includes the making of both factual and legal determinations. The authority to settle and adjust claims does not, however, include the authority to compromise claims." GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 11-6 (1982); *see also Illinois Surety Co. v. United States ex rel. Peeler*, 240 U.S.

The acting Comptroller General, James Hinchman, was substituted as defendant.

[2] The GAO's authority to settle federal employees' compensation claims has since been transferred to the Office of Personnel Management. *See* 31 U.S.C.A. § 3702(a)(2) (West Supp.1998)

214, 219, 36 S.Ct. 321, 60 L.Ed. 609 (1916). Under 31 U.S.C. § 3702(b)(1)(A), a claim against the government "must be received ... within six years after the claim accrues except ... as provided in this chapter or another law."

Lawsuits for back pay under FLSA are subject to the Portal-to-Portal Act's statute of limitations—two years for non-willful violations and three years for willful ones.[3] *See* 29 U.S.C. § 255(a). Shortly after FLSA coverage was extended to federal employees, however, the GAO ruled that "the time limitation for the filing of claims by federal employees under the FLSA which may be considered by our office is six years ...." *In re Transportation Sys. Ctr.*, 57 Comp. Gen. 441 (1978). The GAO relied in part on a letter from the Civil Service Commission, reasoning that the language of 29 U.S.C. § 255—which spoke exclusively in terms of a "cause of action"—limited it to judicial proceedings and did not apply to administrative claims. *See also* PRINCIPLES 11-22 ("[T]he time limit for filing a claim under the Fair Labor Standards Act is the six years prescribed by [then-] 31 U.S.C. § 71a, notwithstanding a two-year statute of limitations for commencing actions at law. Thus, a claim filed under the FLSA more than two years but less than six years after it accrued could still be considered administratively, although the claimant would have lost his recourse to the courts.").

In back pay and overtime cases, the statute of limitations determines how many years of compensation each claimant receives. Since these are continuing claims, a separate cause of action accrues each payday. A six-year statute of limitations means that an employee could recover

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[3] One of the purposes of the Portal-to-Portal Act, enacted in response to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), was to substitute a uniform federal limitations period for the diverse periods provided under state law. *See Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C.Cir.1972).

six years of back pay or overtime compensation dating from the time he or she first filed suit.

On May 23, 1994, the GAO overruled *Transportation Systems Center*.[4] In *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994), the GAO held that the shorter statute of limitations found in the Portal-to-Portal Act would henceforth be applied "in the settlement of pending and future FLSA claims filed with GAO by federal employees." The GAO concluded that 29 U.S.C. § 255 was "another law"—and thus an exception to the six-year limitation period in 31 U.S.C. § 3701(b)(1)(A).

On July 1, 1994, Senator Sarbanes introduced legislation intended, he said, "to reverse a very destructive ruling by the General Accounting Office to apply a retroactive change in the statute of limitations from 6 years to 2 years for Federal employees to file back pay claims under" FLSA. 140 CONG. REC. S8400 (July 1, 1994). As enacted on September 30, 1994, § 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995, Pub.L. No. 103-329, 108 Stat. 2383, 2432, provided:

> In the administration of Section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal Employee under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et seq.*) for claims filed before June 30, 1994.

Senator Sarbanes added that while "the underlying question regarding the appropriate length of the statute of limitation for FLSA claims is one of continuing debate ... under no circumstances should GAO apply the proposed change retroactively." 140 CONG. REC. S8400.

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[4] In doing so, the GAO also overruled *In re Henry G. Tomkowiak*, 67 Comp. Gen. 247 (1988), and *In re Federal Firefighters*, 68 Comp. Gen. 681 (1989), which had applied the six-year statute of limitations.

In what was apparently its first decision after passage of § 640, the GAO applied a six-year statute of limitations to claims filed on May 22, 1989, and pending before it as of June 30, 1994. *See In re Molly D. Kinsley*, 1995 WL 9720 (Jan. 9, 1995). The GAO explained that § 640 "obviates the need for us to discuss the effect, if any, of *Joseph M. Ford* .... In light of section 640, the *Ford* holding is applicable only to claims filed on or after June 30, 1994." *Id.* at n. 7.

Meanwhile, counsel for the employees again contacted the GAO and requested a meeting to resolve pending claims in light of § 640. The GAO acknowledged that "the Act of Congress has modified our *Ford* decision" but pointed out that "our regulations require that the agency from which the claim originated shall initially adjudicate the claim. *See* 4 C.F.R. § 31.4 (1994)."[5] Counsel then brought their clients' claims to the attention of the employing agencies, each of which responded that § 640 gave specific authority to apply a six-year statute of limitations *only* to the Comptroller General and that the agencies themselves were without statutory authority to do so. Counsel appealed these denials to the GAO, but the GAO did not respond. However, with regard to an unrelated FLSA case, the GAO informed the Personnel Director of the U.S. Customs Service that it did "not intend to issue a decision in *Marvin B. Atkinson* ... until the Treasury, Postal Service, and General Government Appropriations Bill, 1996 ... is enacted (because of the possible retroactive repeal of § 640)."

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[5] 4 C.F.R. § 31.4 provides in part:

> A claimant should file his or her claim with the administrative agency or department out of whose activities the claim arose. The agency shall initially adjudicate the claim. If the claimant is not satisfied with the agency's determination, he or she may appeal that determination to the Claims Group, General Accounting Office. Claims which cannot be resolved by the department or agency shall be transmitted to the Claims Group, General Accounting Office, for resolution.

> In November 1995, Congress amended § 640 to state:
>
> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Pub.L. No. 104-52, 109 Stat. 468. Introducing this amendment, Representative Lightfoot said that the GAO, in its 1978 decision, "made a mistake and established regulations stating that Federal employees can get up to 6 years back pay for overtime claims" under the FLSA. The GAO discovered and corrected "its mistake," but then the 103rd Congress "reversed GAO, and passed a law allowing Federal workers to get up to 6 years back pay. The problem is that this act will cost as much as $ 460 million .... The conferees were faced with a choice—either pay hundreds of millions for work done many years ago ... or give the Federal workers the same rights as their private sector counterparts .... [W]e included language providing for the same treatment for public and private workers ... not just because it costs a lot of money, but because it is fair." 141 CONG. REC. H12376 (Nov. 15, 1995).

After the amendment of § 640, the GAO decided *Atkinson*, a case in which the plaintiffs here had been granted leave to intervene. *In re Marvin B. Atkinson*, 1996 WL 31212 (Jan. 29, 1996). Atkinson's claim had been filed on January 1, 1994, and sought compensation for the time he spent traveling between home and work while driving a government vehicle. Atkinson's employing agency denied his claim after the GAO decided *Ford*; he based his administrative appeal on the original § 640. The GAO held that "the November 19, 1995 amendment to section 640 effectively reestablishes the two-year statute of limitations

for any claim where the employee has received overtime pay under any other law or any claim for time spent commuting. We see no basis for the assertion that this amendment does not apply to Mr. Atkinson's claim." *Id.*

On October 27, 1995—before passage of the amendment to § 640 or the GAO's decision in *Atkinson*—plaintiffs brought this action in district court seeking "mandamus and injunctive and declaratory relief." The complaint challenged *Ford*'s adoption of a shortened, retroactive statute of limitation; the GAO's insistence that plaintiffs bring their claims before their respective agencies; the refusal of those agencies to grant the claims; and the GAO's refusal to pass on their appeals. In Supplemental Complaints dated December 13, 1995, and January 29, 1996, plaintiffs added the amendment to § 640 and the GAO's decision in *Atkinson* to their list of requests for declaratory relief.

Plaintiffs alleged that the GAO's decision in *Ford* and the amendment to § 640 had offended due process. They asserted property interests in their back pay claims before the GAO and in their earned but unpaid compensation.[6] On October 10, 1996, the district court (Judge June L. Green) granted defendants' motion for summary judgment. The court later denied plaintiffs' motion for reconsideration. Our review of a grant of summary judgment is de novo. With one exception, we shall affirm the district court's judgment substantially for the reasons stated in the court's thorough and well-reasoned opinion.[7]

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[6] On appeal, plaintiffs also maintain that they have a property interest in the statute of limitations itself. Brief for Appellants at 45. They cite no support for the assertion of such an interest and we are aware of none. As explained earlier, the amount of overtime that plaintiffs can claim is limited by the governing statute of limitations. Thus the two are essentially the same and the same analysis applies.

[7] Appellees have moved to strike section III of plaintiff-appellants' reply brief on the ground that it raised issues not advanced in their opening brief. Plaintiffs there contended for the first time that the Back

The district court held that the GAO's prior application of a six-year statute of limitations had been an error. *Adams v. Bowsher*, 946 F.Supp. 37, 42 (D.D.C.1996). It decided that plaintiffs had no property interest in their pending administrative claims because "a cause of action ... affords no definite or enforceable property right until reduced to a final judgment." *Id.* at 41 (quoting *Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1436 (9th Cir. 1988)). *See also Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir.1989); *Hammond v. United States*, 786 F.2d 8 (1st Cir.1986). Without reaching the issue whether enactment of the original § 640 gave certain plaintiffs property rights in their unpaid overtime, we agree with the district court that any such property interest could be extinguished so long as the retroactive economic legislation met the guarantees of due process. *See General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). Analyzing the legislative history of the amendment to § 640, the district court found that the statute had a "legitimate legislative purpose which was furthered by rational means." 946 F.Supp. at 44 (relying on *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). The court emphasized that Representative Lightfoot's statement indicated a desire to promote fairness and to equate "the rights enjoyed by federal employees to those of private sector employees." 946 F.Supp. at 43.

Pay Act, 5 U.S.C. § 5596, and the Civil Service Reform Act, 5 U.S.C. § 7121(a), display congressional intent to treat federal and private sector employees differently. *See* Reply Brief for Appellants at 10-13. It is our practice not to consider any issue "raised for the first time in a reply brief," a point at which the opposing side has no opportunity to respond. *See Rollins Environmental Servs., Inc. v. EPA*, 937 F.2d 649, 652 n. 2 (D.C.Cir.1991). We grant the motion to strike.

As for plaintiffs' equal protection claim, the district court determined that plaintiffs and the *Kinsley* claimants, whose claims had been subject to a six-year statute of limitations, were not similarly situated. *Id.* at 45. Unlike the claimants in *Kinsley*, plaintiffs did not have a sufficiently developed factual record for their claims to be processed by the GAO prior to the enactment of the amendment. In addition, plaintiffs charged that the GAO violated the Administrative Procedure Act in deciding *Ford* and in failing to handle their cases in a timely fashion—*i.e.*, before § 640 was amended. Such claims were moot, the district court concluded, because Congress "had impliedly adopted the two or three-year limitation period" and the amendment "passe[d] constitutional muster." 946 F.Supp. at 45. Thus the *Ford* and *Atkinson* decisions were valid and it was beyond the power of the court to compel the GAO to apply a longer statute of limitations.

While we therefore are in general agreement with the district court, we cannot affirm the portion of the court's decision holding that plaintiffs' "property" had not been taken without just compensation, in violation of the Fifth Amendment to the Constitution. *See Adams*, 946 F.Supp. at 44. Applying the test for a compensable taking set forth in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), the district court concluded that any economic impact on individual plaintiffs was slight, that the amended § 640 did not "unduly interfere with a distinct investment-backed expectation," and that "the nature of the action taken by Congress is not inconsistent with the purpose behind the takings clause." 946 F.Supp. at 44.

Repeating the argument they made below, plaintiffs argue that "deprivation of [their] previously earned FLSA wages constitutes an unlawful taking of [their] labor without just compensation under the Fifth Amendment." Brief for

Appellants at 19. We are without jurisdiction to decide this claim. The usual remedy for unconstitutional takings is "a suit for money damage (i.e., the 'just compensation' that the Constitution assures) under the Tucker Act in the Court of Federal Claims, 28 U.S.C. § 1491 ...."[8] *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 401 (D.C.Cir.1997). "Except in cases in which the amount in controversy is less than $10,000, in which event jurisdiction is concurrent with the federal district courts, *see* 28 U.S.C. § 1346(a)(2), the Federal Claims Court's jurisdiction in such actions is exclusive." *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 816 (D.C.Cir.1993). While there may be certain exceptions "involv[ing] mandates of direct transfers of money to the government," *see Student Loan Marketing Ass'n*, 104 F.3d at 401 (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir.1995)), they are not applicable here. At oral argument, counsel for the plaintiffs represented that each of their individual claims amounted to more than $10,000. If that were true, the district court would not have had jurisdiction to hear the taking claim in the first place. Even if each back pay claim were less than $10,000 and jurisdiction was based on the "Little Tucker Act" (28 U.S.C. § 1346(a)(2)), the United States Court of Appeals for the Federal Circuit—not us—would have exclusive jurisdiction over the appeal. *See* 28 U.S.C. § 1295(a)(2). Either way then, plaintiffs' taking claim is not properly before us.[9] We

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8 In relevant part 28 U.S.C. § 1491(a)(1) provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

9 After oral argument, the parties called our attention to two recently decided cases—*National Treas. Employees Union & Federal Deposit Ins. Corp.*, 53 F.L.R.A. No. 134 (Feb. 27, 1998); and *Eastern Enterprises v. Apfel*, — U.S. —, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (plurality

therefore remand the takings issue to the district court for a determination of whether jurisdiction was proper under the Little Tucker Act, 28 U.S.C. § 1346(a)(2).

For the reasons stated above, the district court's grant of summary judgment is affirmed in part and reversed and remanded in part.

So ordered.

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opinion). Neither decision affects the outcome of this case. *National Treasury Employees Union* appears to support the reasoning of the district court. In *Eastern Enterprises*, four Justices concluded that it was within the district court's power to award equitable relief for a claim arising under the Takings Clause. *See* — U.S. at —, 118 S.Ct. at 2145 (quoting *In re Chateaugay Corp.*, 53 F.3d at 493). Unlike *Eastern Enterprises*, plaintiffs here are not threatened with a taking by a "challenged statute" that "requires a direct transfer of funds" from them to the government. *See id.* Rather, they seek compensation from the government for unpaid overtime. The only effect of a longer statute of limitations would be to grant plaintiffs more money. Thus the circumstances found to support district court jurisdiction in *Eastern Enterprises* do not exist in this case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, et al.,

Plaintiffs,

v.

CHARLES A. BOWSHER, Comptroller General of the United States, et al.,

Defendants.

Civil Action No. 95-2015.

Filed: Oct. 10, 1996

MEMORANDUM

JUNE L. GREEN, District Judge.

Before the Court are Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment. For the reasons stated hereafter, Plaintiffs' motion is denied and Defendants' motion for Summary Judgment is granted.

I. *BACKGROUND*

Plaintiffs are current or former employees of the United States, employed by one of several agencies as criminal investigators or in some other law enforcement capacity. Those agencies include the Bureau of Alcohol, Tobacco and Firearms ("BATF"), Drug Enforcement Administration ("DEA"), Internal Revenue Service ("IRS"), Customs Service ("Customs"), and the U.S. Secret Service ("Secret Service").

In February of 1990, Plaintiffs brought actions in the United States Court of Federal Claims ("CFC"), alleging,

inter alia, that they improperly had been considered exempt from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), and were entitled to compensation for unpaid overtime wages.[1] (Compl. ¶ 16). Identical claims were filed simultaneously with the General Accounting Office (GAO). (Compl. ¶ 20). In a decision dated October 30, 1992, the CFC concluded that some of the Plaintiffs employed by those agencies were exempt from the FLSA's overtime compensation provisions, while others were not exempt. *Adams v. United States*, 27 Fed.Cl. 5 (1992). Thereafter, in March 1994, the United States reached "partial" settlement agreements with those plaintiffs the CFC had determined to have been non-exempt from the FLSA. *See* Bernstein Decl., Exhibits 8-10.

In the wake of the CFC decision, as well as the ensuing settlements, Plaintiffs in this case, on April 12, 1994, attempted to have their previously filed administrative claims resolved by GAO. Def.Mot.Sum.J., Ex. 4. On May 23, 1994, GAO issued a ruling in a case similar to Plaintiffs', concluding that the two or three-year statute of limitations period contained in the Portal-to-Portal Act, 29 U.S.C. § 255(a), rather than the six-year limitations period contained in the Barring Act, 31 U.S.C. § 3702(b)(1), was applicable to all pending and future FLSA administrative claims, and, therefore, the claim was time barred. *Matter of: Joseph M. Ford*, 1994 WL 201742 (C.G.) (May 23, 1994). This decision reversed the GAO's previous longstanding interpretation that a six-year limitation period applied for filing FLSA claims.[2]

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[1] Those cases have been consolidated in the CFC under the caption *Adams v. United States*, No. 90-162C.

[2] In fact, GAO had been applying the six-year limitations period found in the Barring Act as early as 1978 and at least twice thereafter. *See Transportation Systems Center*, 57 Comp.Gen. 441 (1978); *Federal Firefighters*, 68 Comp.Gen. 681 (1989).

On September 30, 1994, a six-year statute of limitations for FLSA claims filed with GAO was enacted by Congress with the passage of the 1995 Treasury, Postal Service and General Government Appropriations Act, P.L. 103-329, § 640, 108 Stat. 2432 (1994). ("1995 Act.") Section 640 of the 1995 Act ("original Section 640") directed that a six-year statute of limitations be applied for all claims filed prior to June 30, 1994, thereby reversing the GAO's decision in *Ford. Id.* Notwithstanding, Plaintiffs' claims before GAO were not resolved. Instead, Plaintiffs were told that their claims must first be filed with the Plaintiffs' employing agencies. Def.Mot.Sum.J., Ex. 7.

As directed, Plaintiffs filed their claims in the form of letters to the employing agencies outlining their claims.[3] Def.Mot.Sum.J., Exs. 13, 14.

Between February 15 and May 9, 1995, the agencies denied Plaintiffs' claims on the basis that Section 640 of the 1995 Act authorized only the Comptroller to apply a six-year statute of limitations. Def.Mot.Sum.J., Ex. 15. Plaintiffs appealed these decisions to the GAO. Def.Mot.Sum.J., Ex. 16. The GAO, however, did not act on the appeals immediately, but instead sought comments from the employing agencies. Def.Mot.Sum.J., Ex. 17.

On November 19, 1995, Congress amended Section 640 of the 1995 Act, reaffirming the six-year limitation period for FLSA claims filed prior to June 30, 1994, but making the section inapplicable to employees who had previously "received any compensation for overtime hours worked during the period covered by the claim under any other provision of law ..." and for time spent driving between home and duty station. Treasury, Postal Service, and

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[3] Although only those Plaintiffs who had filed before June 30, 1994, were affected by the 1995 Act, the excluded Plaintiffs continued to argue that they should be extended a six-year limitation period, as well. Def.Mot.Sum.J., Ex. 9 at 2.

General Government Appropriations Act of 1996, Pub.L. 104-52, 109 Stat. 468-69 (1995). ("amended Section 640"). GAO has since applied this statute to deny claims for compensation where an employee was paid for administratively uncontrollable overtime ("AUO") and for time spent driving between the claimant's home and office. *Matter of: Marvin B. Atkinson*, 1996 WL 31212 (C.G.) (January 29, 1996).

II. *DISCUSSION*

This case presents complex issues of law because it not only requires interpretation of various competing statutes, but raises constitutional questions, as well.

Plaintiffs argue that Section 640 of the 1995 Act, as well as the subsequent amendment to that section, violate due process because they operate retroactively to divest Plaintiffs of already earned overtime pay. The Government asserts that no property rights are implicated and, even if there were, the government acted properly because its purpose in passing the statute was both reasonable and rational.

The analytical framework for this case begins with whether Plaintiffs had a vested property interest at stake, *see Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 864 (D.C.Cir.1992), and, if so, whether the retroactive effect of such economic legislation had a "legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992) (*quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984)). An examination of the relevant statutes serves as a starting point.

A. *Statute of Limitations Under Fair Labor Standards Act (FLSA)*

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, which allows claims for unpaid overtime compensation to employees, was made applicable to federal workers by amendment in 1974. 29 U.S.C. § 207(a) (1974). The Statute of Limitations for FLSA claims is found in the Portal-to-Portal Act and allows for a two-year limitations period in cases where the violation of the FLSA is nonwillful and three years where the violation is willful. 29 U.S.C. § 255(a) (1947). Notwithstanding the provisions of the Portal-to-Portal Act, the GAO, pursuant to its authority to settle administrative claims under the Barring Act, 31 U.S.C. § 3702, traditionally has applied the six-year statute found in that section, to administrative FLSA claims. *See Transportation Systems Center*, 57 Comp. Gen. 441 (1978); *Federal Firefighters*, 68 Comp. Gen. 681 (1989).

As stated previously, this policy changed with GAO's decision in *Ford* when the GAO determined that the two or three-year statute of limitations contained in the Portal-to-Portal Act (which is expressly applicable to the FLSA) trumped the six-year period found in the Barring Act. *Ford* at 4. In so concluding, the GAO relied on the language of the Barring Act, which establishes a six-year limit on filing claims with GAO "except ... as provided by ... another law." 31 U.S.C. § 3702(b)(1)(A). The GAO determined "another law" to be the Portal-to-Portal Act and denied the claims on that basis. *Ford* at 4.

Congress, however, extended the two or three-year limitation period to six years by passing Section 640 of the 1995 Act. Although this section effectively reversed the *Ford* decision, it did so only for those Plaintiffs who filed their claims prior to June 30, 1994. Moreover, the amendment to Section 640, enacted a year later, placed further limitations on even these individuals by making the

six-year limitation period applicable only to those who had not received overtime compensation under other specified statutes and circumstances or, whose claims involved commuting time. 1996 Act, § 640.

As matters now stand, the Plaintiffs can be divided into two distinct groups for purposes of this analysis: 1) those who filed their claims after the June 30, 1994, date, and, therefore, fall under the 2-3 year limitation period GAO applies to FLSA claims, and 2) those who filed their claims prior to June 30, 1994, but received overtime compensation under other provisions of law or claim overtime for time spent commuting, and are, therefore, excluded from coverage under amended Section 640.

In either instance, the Court, as an initial matter, must decide whether there is a property interest at stake.

B. ***Property Interest***

The two alleged property interests advanced here are: 1) "pending and accrued administrative backpay claims" and 2) "earned but unpaid FLSA overtime compensation." Pls'.Mot.Sum.J. at 1, 44. Courts have held that a cause of action, while a "species of property" protected by due process, nonetheless is "inchoate, and affords no definite or enforceable property right until reduced to a final judgment." *Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1435 (9th Cir.1988), *citing In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir.1987). In the *Austin* case, the Plaintiff was a police officer who had filed his FLSA claim in court. Before the court ruled, however, Congress passed retroactive legislation that effectively extinguished the plaintiff's claim. The appellate court concluded that the Plaintiff had failed to perfect his rights prior to the change in the law, and, therefore, had no property interest in the cause of action. *Id.* at 1435. Here, of course, there is no final judgment involving the Plaintiffs' claims and so, the Court reaches a similar conclusion.

With regard to Plaintiffs' alleged property interest in their "earned but unpaid FLSA overtime compensation," the Court views this as a much closer question. "Property rights to public benefits are defined by the statutes or customs that create the benefits." *Jones v. Reagan*, 748 F.2d 1331, 1338 (9th Cir.1984) *citing Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The court in *Austin* dealt with this issue contritely by relying on the decision in *Jones* which stated: "When ... the statute authorizing the benefits is amended or repealed, the property right disappears." *Id.* Although the outcome essentially is correct, the Court is not inclined to agree with the reasoning in *Jones*.

Prior to FLSA being made applicable to federal workers, there was no expectation of overtime compensation under FLSA and, therefore, no due process property interest. Once added to the FLSA, however, federal workers could thereafter expect to receive overtime compensation treatment under FLSA. While this arguably created a property interest, such a conclusion, without looking further, misses the point that the FLSA is a creature of statute and can only confer benefits contained within the statute. The expectation to overtime compensation, therefore, is governed by the provisions of the FLSA and any other applicable statutory provisions. The question then becomes, exactly what rights did the FLSA and relevant statutes confer on the Plaintiffs, *e.g.*, what is the applicable statute of limitations period for the Plaintiffs?

It is at this juncture of the analysis that the posture of the two groups of Plaintiffs becomes important. For the Plaintiffs who filed their claims after June 30, 1994, or are otherwise excluded under amended Section 640, the question is whether they should have been given the two or

three-year limitation period under the Portal-to-Portal Act, or the six-year period under the Barring Act.

Plaintiffs claim that the Barring Act refers to administrative claims while the Portal-to-Portal Act refers only to "causes of action" filed in court. The Court finds no support for such a position. The Court agrees with the reasoning in *Hickman v. United States*, 10 Cl.Ct. 550, 552 (1986), in which the CFC concluded that Congress acted deliberately in setting the limitation period at two or three years and that there was nothing in the legislative record indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector. Accordingly, this Court cannot construct a statutory interpretation contrary to congressional intent. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The Court is aware that for many years the GAO applied a six-year statute of limitations to FLSA claims filed administratively. The simple fact is that GAO was wrong to do so. Until the passage of Section 640 in the 1995 Act, GAO had no authority to permit a 6 year limitation period for FLSA claims. Moreover, GAO's error cannot impart an expectation sufficient to create a property interest. As the Defendants correctly point out, GAO is granted its authority by Congress and is subject to any limitations Congress may impose. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979). ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."). Here, that limitation was a two or three-year limitation period for FLSA claims. The Court concludes, therefore, that Plaintiffs who are not included under the amended Section 640 (because their claims were

filed after June 30, 1994) have no property interest in back pay claims or unpaid overtime compensation.

The remaining Plaintiffs are a different matter. When Congress extended the statute of limitations for FLSA claims to six years by passage of the original Section 640 of the 1995 Act, Plaintiffs suddenly acquired property interests in their unpaid overtime compensation. Although amended Section 640 excludes many of those who otherwise would have fallen within the original Section 640, the Court does not find that these Plaintiffs automatically lose their property interests. The Court disagrees with the reasoning in *Jones* and *Austin* that Congress may extinguish an otherwise vested property interest concerning agency action merely by passing new legislation. This distinction, however, is academic in light of Congress's authority to deny Plaintiffs their property under a different standard.

C. ***Economic Legislation and Due Process***

The Supreme Court has held that retroactive economic legislation is permissible even if it interferes with legitimate expectations as long as it meets due process guarantees. *Pension Benefit Guaranty Corporation v. R.A. Gray and Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984). In order for due process to be satisfied, economic legislation, applied retroactively, must have "a legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992). In fact, such legislation is given a presumption of constitutionality and the burden rests on the party challenging the statute to show that it was "arbitrary and irrational." *Usery v. Turner Elkhorn*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976).

There is no question that the legislation involved is economic in nature. Amended Section 640 involves the limitations period for money claims made under FLSA. *See Austin v. City of Bisbee*, 855 F.2d at 1435 ("The FLSA is one

of myriad 'legislative Acts adjusting the burdens and benefits of economic life.'" (internal citations omitted)). Further, by its express language, amended Section 640 is retroactive because it applies to individuals who filed their claims prior to June 30, 1994. Moreover, the statute takes away property rights conferred by the original Section 640 by excluding individuals if they have received overtime compensation under different provisions or if their claims involve overtime for commuting.

The question then becomes whether the purpose of the act was legitimate. In determining the legislative purpose, the Court looks both to the legislative history and the language of the statute for guidance.

The legislative record for amended Section 640 is sparse. In fact, there appears to have been little debate on the matter when it came up for a vote on the floor of the House of Representatives on November 15, 1995. What little debate there was took the form of a statement made by Representative Lightfoot in which he indicated that the bill had bipartisan support. 141 Cong.Rec. H12371-02, H12376 (Nov. 15, 1995). Rep. Lightfoot urged passage of the bill on the basis that the government would otherwise be required to pay out an unanticipatedly large sum of money and that government workers should be given the same rights as their private sector counterparts. *Id.* Rep. Lightfoot concluded by stating: "We agreed, not just because it costs a lot of money, but because it is fair." *Id.*

Were the purpose of this statute merely about saving money, the Court would find the legitimacy element to be a more difficult question. As the record shows, however, avoiding a large expenditure is only one of the several stated purposes behind Amended Section 640. More telling is the legislature's stated intention to put federal workers in the same position as private sector workers—a position

consistent with the 1974 legislation which made FLSA applicable to federal workers.

Complicating this analysis, however, is the final language of Amended Section 640, which provides:

> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

109 Stat. 468-69. If the intention was to equate the rights of federal workers with the private sector, then why did Congress leave the six-year limitation period relatively intact for some employees? Such language seemingly creates a contradiction between one of the purposes for the legislation, and the final language of Amended Section 640.

The Court, however, is only slightly concerned about such a discrepancy. Perhaps Congress, wanting to be "fair" to many who had already filed their claims, let stand the six-year limitation period for those whose claims had been filed prior to June 30, 1994. After all, future claims would be given only the two or three-year limitation period in the Portal-to-Portal Act, which is consistent with the rights afforded to the private sector. What Congress changed in the Amended Section 640 was who (of those who filed prior to June 30, 1994) could take advantage of the extended limitation period. While deciding to allow the six-year limitation period to remain temporarily, Congress apparently decided to limit such claims to those workers who had not received overtime compensation for the same period under another provision of law and to exclude any claims involving time spent commuting. There is nothing improper about this. In fact, with regard to the first limitation, it is difficult to imagine any purpose more

legitimate than preventing workers from receiving double overtime compensation.

As for the limitation concerning commuting, this is a closer question, especially because there is nothing specific in the legislative history that might offer guidance. Nonetheless, consistent with the reasoning thus far, the Court finds the purpose of this provision to be legitimate. As already noted, Rep. Lightfoot gave as reasons for passage of the amendment "cost" and "fairness." But Rep. Lightfoot also spoke of equating the rights enjoyed by federal employees to those of private sector employees. Under 29 U.S.C. § 254(a) and (b) (1947), employers are not generally liable for overtime compensation for commuting absent a contract or custom. This provision has been extended to include federal workers, as well. *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C.Cir.1972), *cert. denied* 409 U.S. 1012, 93 S.Ct. 441, 34 L.Ed.2d 306. In any event, private sector employees are limited by the two or three-year statute of limitations for such actions, as would be the Plaintiffs here were it not for the original Section 640. 29 U.S.C. § 255 (1947). To the extent that Congress acted to equate federal workers' rights with those of the private sector concerning overtime claims for commuting, the Court finds amended Section 640 to have a legitimate purpose. Further, the rational means was to enact amended Section 640.

Accordingly, the Court concludes that Congress, by enacting amended Section 640, had a legitimate purpose which was furthered by a rational means.

D. ***Taking without Compensation***

Plaintiffs also argue that their unpaid FLSA overtime was property that was taken without just compensation in violation of the Fifth Amendment of the Constitution. The Court disagrees.

The test for determining whether a compensable taking has occurred is set forth in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986), in which the Supreme Court identified the following three factors: 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations, and 3) the character of the governmental action.

Concerning the first factor, the Court does not find that Plaintiffs will suffer a great economic impact. It is true that the total payout for Plaintiffs' claims would run into the millions of dollars and some of the claims go back as far as twelve years. This case, however, is not a class action. The "millions of dollars" figure does not, therefore, inure to the group as a whole. Rather, any impact must be measured against the individual claims. Plaintiffs have failed to show how any one of the Plaintiffs would suffer a greater economic impact than merely losing an entitlement that only in recent years had been discovered. Moreover, insofar as amended Section 640 prevents the Plaintiffs from receiving overtime compensation under FLSA when such compensation was paid under another provision of law, there can be little, if any, economic impact to the Plaintiffs.

Similarly, under the second prong, amended Section 640 does not unduly interfere with a distinct investment-backed expectation. Although the hours worked by the Plaintiffs are tantamount to an investment, there was no legitimate expectation to a six-year limitation period. As recounted previously, the proper limitation period for FLSA claims is two or three years as stated by the Portal-to-Portal Act. 29 U.S.C. § 255(a) (1947). While Congress extended the limitation period for some individuals in some instances, it could also limit the application of this extension and did so.

Plaintiffs' only legitimate expectation was to a two or three-year limitation period.

The final factor concerns the character of the action. The Court finds that this factor, for the most part, is subsumed by the above discussion concerning due process and the legitimacy of Congress's purpose in passing amended Section 640. As the Supreme Court stated in *Connolly*: "The purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. at 227, 106 S.Ct. at 1027, *quoting Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). Congress apparently decided that it was unfair for the public to bear the burden of a mistake made by GAO. The legislative history of amended Section 640 expressly mentions fairness as a reason for the legislation. 141 Cong.Rec. H12371-02, H12376 (Nov. 15, 1995). Accordingly, the Court finds that the nature of the action taken by Congress is not inconsistent with the purpose behind the takings clause.

E. ***Equal Protection***

Plaintiffs also argue that they were denied equal protection of the laws guaranteed by the Fifth Amendment to the Constitution. Essentially, Plaintiffs allege that in the intervening time between the passage of the original Section 640 and the amended Section 640, several claimants had their claims favorably processed ("Kinsley claimants"), while Plaintiffs' claims were not acted upon during that same period.

The equal protection clause is meant to protect persons similarly situated from receiving disparate treatment under applicable laws. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d

313 (1985). Where such disparate treatment does occur, there must be a rational basis. *Heller v. Doe*, 509 U.S. 312, 318, 113 S.Ct. 2637, 2641, 125 L.Ed.2d 257 (1993). Here, the Court does not reach the rational basis question because the Court concludes that Plaintiffs and the Kinsley claimants were not similarly situated.

Although the Kinsley claimants and the Plaintiffs each had claims that were received by GAO during the interim period between passage of the original section 640 and the amended Section 640, they arrived in very different stages of development. The Kinsley claimants had received rulings on their claims by the Office of Personnel Management (OPM) in 1993, which included a fully developed record of factual findings. *Kinsley*, No. B-235609.2, 1995 WL 9720, 2 (Comp. Gen. Jan. 9, 1995). Plaintiffs, however, had not received administrative rulings on their claims when they first approached GAO following enactment of the original Section 640 and there does not appear to have been a factual record upon which GAO could even have reviewed the claims. While the Plaintiffs, as directed, brought their claims to the employing agencies, the claims for the Kinsley claimants were resolved pursuant to the newly enacted original Section 640 in January 1995. *Id.* By the time Plaintiffs received decisions from the individual agencies (March 10 through May 12, 1995), however, the Treasury Department was already lobbying Congress to repeal original Section 640. (Bernstein Decl., Exs. 11, 12).

Whether such activity is a proper reason to delay resolution of pending claims is a difficult question, but one the Court does not have to answer. Rather, the Court is satisfied that Plaintiffs did not have a sufficiently developed factual record for their claims and, given the sheer number of Plaintiffs in this case, would not have had one by the time

amended Section 640 was enacted in November 1995.[4] The Court, therefore, concludes that Plaintiffs were not denied equal protection of the laws because they were not similarly situated with those whom Plaintiffs complain were given preferential treatment.

F. *Administrative Procedures Act ("APA")*

In light of the Court's conclusions thus far, Plaintiffs' remaining claims are moot. Plaintiffs allege that the GAO and the employing agencies violated the APA by following the *Ford* decision and again when the GAO failed to resolve Plaintiffs' claims in the interim period between passage of original Section 640 and amended Section 640. Plaintiffs request that the Court declare the *Ford* decision invalid and order the GAO to apply a six-year statute of limitations to all of their claims.

Plaintiffs' claims in this regard depend upon the argued invalidity of amended Section 640. The Court has determined that amended Section 640 passes constitutional muster. Moreover, insofar as Congress impliedly adopted the two or three-year limitation period (and which this Court finds otherwise to be applicable) for all claims that do not fall under amended Section 640, the *Ford* and the *Atkinson* decisions are valid. Finally, the Court cannot in this case "compel agency action unlawfully withheld or unreasonably delayed" under the APA, 5 U.S.C. § 706(1), because the delay complained of has been mooted by enactment of amended Section 640.[5]

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[4] Defendants argue that because of the number of claimants and the enormity of the task of determining their substantive eligibility for backpay, any final decision was months, if not years, away. Def.Mot.Sum.J. at 46.

[5] Of course, the Court expects that those Plaintiffs who meet the criteria of amended Section 640 will have their claims resolved in a timely fashion.

III. *CONCLUSION*

For the reasons stated above, the Court concludes that Congress did not act unconstitutionally by enacting amended Section 640, nor did the GAO violate equal protection guarantees in processing other claims. Finally, in light of these conclusions, Plaintiffs' remaining claims pursuant to the APA are moot. Judgment, therefore, is entered for the Defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, ET AL., PLAINTIFF,

V.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

CIVIL ACTION NO. 95-2015

ORDER

Upon review of Plaintiffs' Motion Under F.R.C.P. Rule 59(e) for Reconsideration and to Alter and Amend the Judgment Filed Herein, the Opposition and Reply thereto, the entire record herein and for the reasons stated in the accompanying memorandum of law, it is by the Court this 6th day of March 1997,

ORDERED that Plaintiffs' motion is DENIED; and it is further

ORDERED that the Clerk shall mail copies of this Order to:

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/s/ June L. Green.
June L. Green
United States District Court
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, ET AL., PLAINTIFF,

V.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

CIVIL ACTION NO. 95-2015
FILED MARCH 7, 1997

MEMORANDUM

JUNE L. GREEN, United States District Court Judge

Before the Court is Plaintiffs' motion for reconsideration and to alter and amend this Court's Order dated October 10, 1996. The motion is made pursuant to Federal Rule of Civil Procedure 59(e). As a basis for this motion, Plaintiffs argue that reconsideration is required because the Court relied on theories not litigated by the parties and that the Court's conclusions, in certain respects, are contrary to the facts and law. For the reasons that follow, Plaintiff's motion is denied.

A motion brought pursuant to Federal Rule of Civil Procedure 59(e) gives the Court discretionary authority to reconsider an earlier ruling when there has been an "intervening change of controlling law, new evidence becomes available, or there is need to correct a clear error or prevent manifest injustice." Firestone v.Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996), citations omitted.

I. LEGITIMATE LEGISLATIVE PURPOSE

Plaintiffs argue that the Court erred on several important points in reaching its decision. First, Plaintiffs

state that the Court erred by assuming that Plaintiffs would have received "double overtime compensation" had it not been for amended Section 640. The Plaintiffs misinterpret the Court's use of the phrase "double overtime compensation." Whether these Plaintiffs sought or were entitled to "double overtime compensation" is irrelevant to the Court. In analyzing the legitimacy of the Treasury, Postal Service, and General Government Appropriations Act of 1996, Pub. L. 104-52, 109 Stat. 468-69 (1995)("amended Section 640"), the Court meant only to show that the provision excluding employees who had received overtime compensation under another provision of law, was reasonable. As the Court concluded, "fairness" was one of the reasons given for enacting amended Section 640. It is rational for Congress to have determined that employees who had not been compensated under another provision of law were entitled to a longer limitations period.

II. EQUALITY OF FEDERAL WORKER LIMITATIONS PERIOD

Plaintiffs argue also that Congress could not have been attempting to place private and government workers in a position of parity with regard to commuting time because non-federal workers generally are afforded fewer rights to overtime under the Fair Labor Standards Act ("FLSA"). Plaintiffs go to some length to show that many differences exist between the rights of federal and private sector employees in the application of the FLSA and argue that parity between the two groups has never been a goal of Congress.

Again, Plaintiffs have misinterpreted the Court's analysis. In concluding that Congress acted rationally concerning the commuting provision of amended Section 640, the Court determined that equating rights of federal employees and private sector employees under the FLSA was, in fact, one of the reasons for enactment. This does not

mean, however, that the rights of federal and private sector employees must be equalized in every aspect under the FLSA in order for the statute to survive scrutiny. Even if differences remain concerning the rights of the two groups, equating the limitation period for federal and private sector employees for commuting claims is consistent with Congress' stated intention of "fairness" and complies with the rational basis test.

III. APPLICABILITY OF THE WINSTAR DECISION

Plaintiffs next argue that the Court erred by applying the permissive rational basis test. In support, Plaintiffs cite the recent case United States v. Winstar Corp., 116 S.Ct. 2432 (1996), for the proposition that the federal government is held to a higher standard where it seeks to avoid obligations it voluntarily assumed. Plaintiffs argue that the Court failed to address this case in its ruling.

Quite simply, the Court did not address the Winstar decision because it is not applicable to the facts here. The Winstar decision is a contract case that deals with the federal government's breach of the terms of an express agreement into which it had voluntarily entered. Id. There the Plaintiffs, viable financial institutions, were induced by the federal government (Federal Home Loan Bank Board ("FHLBB")) to acquire failing thrifts in return for being given certain accounting treatment. Thereafter, Congress enacted the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA") making accounting standards for thrifts more stringent. The result of FIRREA was that it effectively altered the existing contracts because it changed the accounting standards. Consequently, two of the plaintiff institutions failed and were forced into liquidation. The Supreme Court, in a plurality decision, concluded that the express contracts had been breached and the plaintiffs were entitled to damages. Id. at 1. The

Plaintiffs here, by contrast, did not plead this case as a contract action. Further, there have never been any facts to suggest the existence of an express contract. An implied contract theory, similarly, is not available to Plaintiffs because, as the Defendants properly point out, any entitlement federal employees may have to compensation is not determined by ordinary contract principles, but by applicable statutes and regulations governing compensation. Kizas v. Webster, 707 F.2d 524, 535 (D.C. Cir. 1983) (citing United States v. Larionoff, 431 U.S. 864, 869 (1977).) The Court has already addressed those statutes and regulations and has made the appropriate rulings.

Even if there were an express contract in this case (or an actionable implied contract), Winstar would not apply. The Supreme Court in Winstar made it clear that nothing in the Winstar record "purported to prevent the Government from changing the way it regulated the thrift industry." Winstar at 28. Contrary to the Plaintiffs here, the plaintiffs in Winstar did not seek to invalidate the new statute nor did they seek injunctive relief against application of the new law. Id. at 41.[1] Instead, the Winstar Plaintiffs sought money damages for breach of the Government's express agreements, and it was on that basis that the Supreme Court made its analysis. The Plaintiffs are simply incorrect in stating that in Winstar "the legislation [FIRREA] was declared unconstitutional." (Mtn. for Recon. at 20).

IV. PLAINTIFFS' "TAKING" CLAIM

The Plaintiffs next argue that this Court erred when it denied their "taking" claim on the basis that Plaintiffs would not suffer a great economic impact. In support, Plaintiffs now allege that each employee would be entitled to

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[1] The Plaintiffs here have never asked for money damages. Instead, they seek declaratory and injunctive relief concerning the statutory limitations period for filing administrative claims. Compl. pp. 1234-1236.

approximately $28,000 in back pay and argue that such an amount is not insubstantial.

The Plaintiffs take issue with the relevance the Court attributes to the fact that this case was not brought as a class action. The Plaintiffs are correct in that the amount of loss to the Plaintiffs would be the same even if this case had been brought as a class action. What the Court was attempting to show, however, was that the Plaintiffs had provided no record evidence reflecting their alleged individual losses and therefore the Court could only speculate as to economic impact. Even now, the Plaintiffs ask the Court to divide an estimated amount a congressman stated during a congressional debate by the number of Plaintiffs here, in order to arrive at an average amount for each Plaintiff. The Court declines to do so.

More important, even if it could be shown that there was a great economic impact on the Plaintiffs, it would not change the Court's holding. As discussed in the original Memorandum and Order, the Court made its conclusions regarding the "taking" claim on the basis that the alleged investment-backed expectation was the limitation period rather than back-pay (which was never sought in the Complaint). The Court determined that there was no legitimate "investment-backed expectation" to a six-year limitation period.

V. RETROACTIVE SHORTENING OF THE STATUTE OF LIMITATIONS

Another basis upon which Plaintiffs ask for reconsideration is that the Court allegedly ignored authority that retroactive shortening of a limitations period is improper. The Court did not address those cases because it determined that such an argument was subsumed by the earlier analysis concerning the viability of the claims at issue and whether the statutes in question withstood

scrutiny. The Plaintiffs present nothing now that would cause the Court to re-visit this issue.

VI. THE DOCTRINE OF EQUITABLE TOLLING

Yet another reason the Plaintiffs ask for reconsideration is on the basis that the "doctrine of equitable tolling" prevents the retroactive application of amended Section 640. Contrary to what Plaintiffs argue, this is a new argument that could have been, but was not, raised earlier. Federal Deposit Insurance Corporation v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)(motions to alter or amend cannot be used to raise arguments which could, and should, have been made before the judgment issued, nor can such motions be used to argue a case under a new legal theory (internal citations omitted)). It is, therefore, untimely.

Even if this claim had been raised in a timely fashion, the Court's conclusion would have been no different. The doctrine of equitable tolling is a judicially constructed doctrine that allows a limitation period to be tolled in two situations: 1) where a Plaintiff files a defective pleading within the statutory period, or 2) "where a complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990), citing, Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231 (1959)(adversary's misrepresentation caused plaintiff to let filing period lapse). The Plaintiffs argue that equitable tolling should apply here because they relied on agency notices that the statute of limitations for filing FLSA claims was six years. Reliance alone, however, is not enough. Missing from Plaintiffs' argument is any allegation that the agency engaged in misrepresentation as did the Defendant in Glus. Without the element of intentionality of some wrongdoing, the Court concludes that the doctrine of equitable tolling would not be available to Plaintiffs even if this theory had been raised in a timely manner.

Even more important, Plaintiffs cite no authority that the doctrine of equitable tolling can be used to contravene express congressional action. Congress has considered all of the factors and equities at issue and its conclusions are contained in amended Section 640.

VII. "EQUAL PROTECTION"

As a final basis for reconsideration, Plaintiffs ask the Court to revisit the issue of equal protection. The Court has reviewed Plaintiffs' arguments on this issue and concludes that nothing has been presented that the Court has not already considered. No further analysis, therefore, is warranted and the Court will not alter its Judgment in this regard.

VIII. CONCLUSION

For the reasons stated, the Court finds no basis to alter its Judgment in this case. The Plaintiffs have failed to show that there has been an intervening change of controlling law, new evidence has become available, or there is need to correct a clear error or prevent manifest injustice. Accordingly, Plaintiffs' motion is denied. An appropriate order accompanies this Memorandum.

/s/ June L. Green.
June L. Green
United States District Court Judge

DATE:

[March 6, 1997]

U.S. CONST. AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1995 TREASURY, POSTAL SERVICE AND GENERAL GOVERNMENT APPROPRIATIONS ACT
Pub. L. No. 103-329, 108 Stat. 2382, § 640 (1994)

In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (U.S.C. 201 et seq.) for claims filed before June 30, 1994.

Pub. L. No. 104-52, 109 Stat. 468 (1995)
TITLE I--DEPARTMENT OF THE TREASURY
DEPARTMENTAL OFFICES
SALARIES AND EXPENSES

For necessary expenses of the Departmental Offices including operation and maintenance of the Treasury Building and Annex; hire of passenger motor vehicles; maintenance, repairs, and improvements of, and purchase of commercial insurance policies for, real properties leased or owned overseas, when necessary for the performance of official business; not to exceed $2,900,000 for official travel

expenses; not to exceed $2,950,000 to remain available until expended, shall be available for information technology modernization requirements; not to exceed $150,000 for official reception and representation expenses; not to exceed $258,000 for unforeseen emergencies of a confidential nature, to be allocated and expended under the direction of the Secretary of the Treasury and to be accounted for solely on his certificate; $105,929,000, of which up to $500,000 shall be available to reimburse the District of Columbia Metropolitan Police Department for personnel costs incurred by the Metropolitan Police Department between May 19, 1995 and September 30, 1995 as a result of the closing to vehicular traffic of Pennsylvania Avenue Northwest and other streets in the vicinity of the White House: Provided, That Section 640 of Title VI of the Treasury Postal Service and General Government Appropriations Act, 1995 (Public Law 103-329, 108 Stat. 2432), is amended by adding at the end thereof the following new sentence: "This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station."

Supreme Court, U.S
FILED
JUL 6 - 2005
OFFICE OF THE CLERK

(4) (3)

Nos. 04-1225 and 04-1226

In the Supreme Court of the United States

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

DAVID M. WALKER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

An action to enforce a cause of action under the Fair Labor Standards Act of 1938 (FLSA) generally must be commenced no later than two years after the cause of action accrued. In addition to their judicial remedies, federal employees with FLSA claims may invoke an administrative claims settlement process provided under the Barring Act, 31 U.S.C. 3702 (2000 & Supp. II 2002). In 1994, Congress retroactively extended the limitations period under the Barring Act from two or three years to six years for FLSA claims of federal employees that had been filed before June 30, 1994. Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, § 640, 108 Stat. 2432. One year later, Congress amended Section 640 to provide that the retroactive extension "shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law." Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, Tit. I, 109 Stat. 468-469.

The questions presented are as follows:

1. Whether the 1995 legislation violates the Takings Clause.

2. Whether the 1995 legislation violates the Due Process Clause.

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In the Supreme Court of the United States

No. 04-1225

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 04-1226

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

DAVID M. WALKER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in Nos. 04-1225 and 04-1226 (04-1225 Pet. App. 54a-64a; 04-1226 Pet. App. 1a-11a) is reported at 154 F.3d 420. The memorandum and order of the district court in Nos. 04-1225 and 04-1226 (04-1225

Pet. App. 74a-90a; 04-1226 Pet. App. 12a-30a) is reported at 946 F. Supp. 37.

The opinion of the United States Court of Appeals for the Federal Circuit in No. 04-1225 (04-1225 Pet. App. 1a-24a) is reported at 391 F.3d 1212. The opinion of the Court of Federal Claims in No. 04-1225 (04-1225 Pet. App. 25a-51a) is not yet reported, but is available on Westlaw at 2003 WL 22339164.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 28, 1998. Petitions for rehearing were denied on November 9, 1998. The petition for a writ of certiorari was denied on June 7, 1999.

This case was then transferred to the Court of Federal Claims, from which an appeal was taken to the United States Court of Appeals for the Federal Circuit. The Federal Circuit entered its judgment on December 9, 2004. The petitions for a writ of certiorari were filed on March 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subject to certain occupational and other exemptions, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, entitles employees to overtime pay (usually based on hours worked in excess of a 40-hour work week) at the rate of one and one-half times an employee's normal hourly compensation. 29 U.S.C. 207(a), 213(a)(1). Employees may bring suit for unpaid FLSA overtime compensation in "any court of competent jurisdiction." 29 U.S.C. 216(b). In the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, Congress added the following statute of limitations to the FLSA:

> Any action commenced * * * to enforce any cause of action for * * * unpaid overtime compensation * * * under the Fair Labor Standards Act * * *
>
> (a) * * * may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C. 255(a).

When the FLSA and the Portal-to-Portal Act were enacted, federal employees were expressly excluded from the FLSA's coverage. *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1294 & n.10 (D.C. Cir.), cert. denied, 409 U.S. 1012 (1972). In 1974, the FLSA was amended to cover federal employees, subject to the statute's general exemptions (*e.g.*, 29 U.S.C. 213) for executive, administrative, and professional employees, among others. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 59 (29 U.S.C. 203(e)(2)(A)).

In addition to their judicial remedies, federal employees may invoke the general administrative claims settlement process provided under the Barring Act, 31 U.S.C. 3702 (2000 & Supp. II 2002). The Barring Act applies to a wide range of monetary claims against the United States. When the claims at issue here were filed, it authorized the Comptroller General to settle claims "received * * * within 6 years after the claim accrues except * * * as provided in this chapter or another law." 31 U.S.C. 3702(b)(1)(A). Non-federal employees may not invoke the Barring Act's administrative process for their FLSA claims because they do not have claims against the government.

2. a. Petitioners are current and former federal law enforcement officers who seek overtime compensation under the FLSA for periods between 1984 and 1995. In suits filed between February 1990 and December 1995 in the Court of Federal Claims (CFC), petitioners claimed that their employing agencies had incorrectly classified their positions as exempt from the overtime provisions of the FLSA. Each petitioner also lodged an administrative claim with the General Accounting Office (GAO) under the Barring Act.

In October 1992, the CFC held that certain grades of employees were not exempt from the FLSA and had therefore been entitled to overtime pay. *Adams* v. *United States*, 27 Fed. Cl. 5 (1992). In March 1994, petitioners entered into settlement agreements with the United States that gave those employees overtime pay and interest for the two-year period before each suit was filed, without prejudice to their right to pursue administrative remedies. 04-1225 Pet. App. 54a-55a. Returning to GAO, petitioners sought a total of six years of back pay under the FLSA —four years beyond what they had obtained in the CFC settlement, and four years beyond what the FLSA itself provides, see 29 U.S.C. 255(a).

b. When GAO had first confronted the question in 1978, it concluded that the six-year period set forth in the Barring Act, 31 U.S.C. 3702(b)(1)(A), applies to administrative proceedings to recover overtime pay under the FLSA. *In re Transportation Sys. Ctr.*, 57 Comp. Gen. 441 (1978). By the time petitioners' administrative claims were pending, however, GAO had begun actively reconsidering that ruling. In *In re Ford*, 73 Comp. Gen. 157 (1994), GAO overruled *Transportation Systems* and determined that the relevant limitations period is the one set forth in the FLSA itself, as amended by the Portal-to-Portal Act.

GAO reasoned that "[w]hen a statute creates a right that did not exist at common law and restricts the time to enforce it, expiration of the time limit not only bars the remedy but extinguishes the underlying rights and liabilities of the parties." *Ford*, 73 Comp. Gen. at 160-161. Thus, GAO concluded, "a time limitation imposed on a statutorily created judicial cause of action will apply to administrative proceedings to adjudicate the same claims absent a specific provision to the contrary." *Id.* at 161. "[L]egislative determinations to limit the extent of a party's exposure to liability or to discourage claims involving stale facts or documentation problems are no less relevant to administrative than to judicial proceedings." *Ibid.*

GAO further explained that when Congress extended FLSA coverage to federal employees, "no congressional intent was manifested in the amending language or its underlying legislative history that federal employees would be accorded a more liberal limitations period than employees in the private sector." 73 Comp. Gen. at 160 (quoting *Hickman* v. *United States*, 10 Cl. Ct. 550, 552 (1986)). Construing the Barring Act to extend the limitations period for administrative back pay claims against the government, GAO concluded, would disserve congressional intent by "creat[ing] disparate treatment * * * between federal employees and private sector employees" who have no administrative alternative to filing a court suit for back pay. *Id.* at 161.

c. Petitioners and others persuaded Congress to grant relief from the effect of the *Ford* decision on some already-pending FLSA administrative claims. In Section 640 of the Treasury, Postal Service and General Government Appropriations Act, 1995, enacted on September 30, 1994, Congress provided:

> In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et seq.*) for claims filed before June 30, 1994.

Pub. L. No. 103-329, § 640, 108 Stat. 2432.

Invoking Section 640, petitioners contacted GAO seeking resolution of their claims. GAO reminded petitioners that their claims had to be processed first through their employing agencies. See 4 C.F.R. 31.4 (1994). Petitioners brought their claims to the attention of the employing agencies, which denied them on the ground that Section 640 by its terms authorized only the Comptroller General to apply a six-year statute of limitations. 04-1225 Pet. App. 58a.

In 1995, petitioners appealed those agency determinations to GAO. By then, however, Congress was considering repeal of Section 640. On November 19, 1995, Congress amended Section 640 as follows:

> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law * * *, or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468-469. The sponsor of the amendment explained that GAO's 1978 decision to apply a six-year limitations period had been "incorrect [because] the law states that everyone would only be entitled to two years" of back pay for FLSA violations. 141 Cong. Rec. 32,597 (1995) (remarks of Rep.

Lightfoot). He added that, although in *Ford* the GAO had "corrected its mistake," the 1994 legislation—which required GAO to allow up to six years of back pay for claims that had already been filed by June 30, 1994—would cost the government as much as $460 million, "nearly the entire Secret Service budget." *Ibid.* "The conferees were faced with a choice—either pay hundreds of millions for work done many years ago and fire four or five thousand employees[,] or give the Federal workers the same rights as their private sector counterparts." *Ibid.* Therefore, "we included language providing for the same treatment for public and private workers * * * not just because [to do otherwise] costs a lot of money, but because it is fair." *Ibid.*

GAO applied amended Section 640 in the pending case in which petitioners had intervened. *In re Atkinson*, No. B-256938, 1996 WL 31212 (Comp. Gen. Jan. 29, 1996). GAO then advised petitioners in March 1996 that it would similarly adjudicate their FLSA claims in accordance with amended Section 640.

3. Petitioners brought this action in the district court in October 1995—before passage of the amendment to Section 640 and before GAO's decision in *Atkinson* —seeking mandamus, injunctive, and declaratory relief requiring GAO to apply a six-year statute of limitations to their claims notwithstanding *Ford*. 04-1225 Pet. App. 60a. In supplemental complaints, petitioners added challenges to amended Section 640 and *Atkinson*. *Ibid.*

a. The district court granted the government's motion for summary judgment. 04-1225 Pet. App. 74a-90a. The court held that petitioners' pending administrative claims did not constitute separate "property" rights entitling them to demand application of the pre-*Ford* interpretation of the law because a cause of action is "inchoate, and affords no definite or enforceable property right until reduced to final

judgment." *Id.* at 79a (quoting *Austin* v. *City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988)). The court also held that petitioners had no enforceable property interest in their "earned but unpaid FLSA overtime compensation." *Id.* at 80a. "[T]he FLSA," it explained, "is a creature of statute and can only confer benefits contained within the statute," and "there was nothing in the legislative record [of the FLSA] indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector." *Id.* at 80a, 81a. Indeed, "[u]ntil the passage of Section 640 in the 1995 Act, GAO had no authority to permit a 6 year limitation period for FLSA claims," and its past practice of doing so was simply "wrong." *Id.* at 81a.

The district court added that those petitioners who had filed administrative claims before June 30, 1994 had derived "property interests in their unpaid overtime compensation" from the enactment of Section 640. 04-1225 Pet. App. 82a. The court concluded, however, that those petitioners are not entitled to relief, because such interests could be extinguished consistent with the Due Process Clause by economic legislation having "a legitimate legislative purpose furthered by rational means." *Ibid.* (quoting *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992)). The court found that the amendment to Section 640 met that standard. *Id.* at 82a-83a.

For similar reasons, the district court held that petitioners had identified no unconstitutional taking. 04-1225 Pet. App. 85a-87a.

b. Except on the takings issue, the D.C. Circuit affirmed "substantially for the reasons stated in the [district] court's thorough and well-reasoned opinion." 04-1225 Pet. App. 60a. The court of appeals determined that "the usual remedy for unconstitutional takings is a suit for

money damage (*i.e.*, the 'just compensation' that the Constitution assures) either under the Tucker Act in the CFC, 28 U.S.C. 1491," or if the amount in controversy is less than $10,000, in the district court under the Little Tucker Act, 28 U.S.C. 1346(a)(2). 04-1225 Pet. App. 63a (citations and footnote omitted). Either way, the D.C. Circuit concluded, exclusive appellate jurisdiction would lie in the Federal Circuit. *Ibid.*

This Court denied petitioners' petition for a writ of certiorari. 526 U.S. 1158 (1999).

4. a. On remand, the district court transferred this case to the CFC, which dismissed the takings claims. 04-1225 Pet. App. 25a-51a, 52a. The CFC concluded that govern-mental obligations to pay money pursuant to a statute do not give rise to a protected property interest for purposes of the Takings Clause. *Id.* at 26a, 36a-48a. Because "[a]ll the plaintiffs have identified is a run-of-the-mill claim for liability," their "claim does not fall under the safeguard of the Takings Clause, but is at best a due process claim to secure an alleged entitlement," a claim that the D.C. Circuit had rejected. *Id.* at 41a, 48a.

The CFC likewise rejected petitioners' alternative argument that the amendments to Section 640 were a taking of their cause of action under the FLSA. 04-1225 Pet. App. 48a-50a. "While it is true that in certain circumstances abolition of a cause-of-action can rise to a level of an unconstitutional taking * * * it is equally true that [petitioners'] cause-of-action must secure a cognizable 'legally protected interest.'" *Id.* at 50a. Here, the court reasoned, petitioners' claim for overtime payment is not a property right protected by the Takings Clause. *Ibid.*

b. The Federal Circuit affirmed. 04-1225 Pet. App. 1a-24a. The court rejected petitioners' contention that they own a Fifth Amendment property interest under the

FLSA, stating that petitioners "confuse a property right cognizable under the Takings Clause of the Fifth Amendment with a due process right to payment of a monetary entitlement under a compensation statute." *Id.* at 12a. The court likewise rejected the argument that petitioners' right to FLSA overtime payment became a vested contractual right once the work was completed, noting that the terms of petitioners' employment are governed by statute rather than by any express or implied contract. *Id.* at 14a. Nor, the court reasoned, is the government's statutory obligation to pay overtime a "debt" evidenced in a legal instrument; petitioners "have nothing more than a bald allegation that they are owed underpaid overtime compensation by the Government." *Id.* at 17a. The court also reaffirmed its holding in *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327 (Fed. Cir. 2001) (en banc), cert. denied, 535 U.S. 1096 (2002), that the mere imposition of an obligation to pay money does not give rise to a takings claim. 04-1225 Pet. App. 19a-22a.

Finally, the Federal Circuit rejected petitioners' claim that Congress's amendment of Section 640 in 1995 effected a *per se* taking of their GAO administrative claim. The court explained that a cause of action may constitute property for purposes of the Takings Clause only when "the cause of action protects a legally-cognizable property interest." 04-1225 Pet. App. 23a. Petitioners "have not cited any precedent finding such a property interest in a claim of Government liability before an administrative agency." *Ibid.*

DISCUSSION

Petitioners assert (04-1225 Pet. 12-28; 04-1226 Pet. 14-25) that the Federal Circuit erred in holding that the 1995 legislation does not violate the Takings Clause, and that the

D.C. Circuit erred in holding that the legislation does not violate the Due Process Clause. The courts of appeals' decisions are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. Thus, a fundamental precondition to any takings claim is the taking of "property." See, *e.g.*, *United States* v. *Security Indus. Bank*, 459 U.S. 70, 75 (1982). Such "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)).

The Federal Circuit correctly held that petitioners have no cognizable property interest for purposes of the Takings Clause. 04-1225 Pet. App. 10a-24a. After petitioners performed the work at issue, and after petitioners filed their administrative and judicial claims, Congress retroactively extended the statute of limitations applicable to their administrative claims from two to six years. Treasury, Postal Service and General Government Appropriations Act, 1995, Pub. L. No. 103-329, § 640, 108 Stat. 2432. The following year, Congress retroactively repealed that retroactive extension as applied to employees who had already received some form of overtime compensation for the work at issue. Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468-469. Because petitioners did not possess a property right in the retroactively extended statute of limitations for administrative claims, the withdrawal of that

extension did not take any of their property for purposes of the Takings Clause.

a. Although petitioners argue correctly that a contract with the United States can create a property right, see 04-1225 Pet. 13 (citing *Perry* v. *United States*, 294 U.S. 330 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934)), petitioners have no relevant contract rights. Petitioners contend (04-1225 Pet. 12) that they have a contractual right to their "earned wages," but that contention is both wrong and irrelevant. It is wrong because the employment relationship between the federal government and its employees is governed by statute, not contract. And it is irrelevant because Congress did not divest petitioners of their right to earned wages; instead, it merely reinstated the same statutory limitations period for administrative claims that had been in effect at the time that petitioners performed the relevant work and filed their claims.

i. It is well settled that "federal employment does not rest on contract in the private sector sense." *Karahalios* v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 535 (1989). As the Federal Circuit explained:

> [F]ederal workers serve by appointment, and their rights are therefore a matter of legal status even where compacts are made. In other words, their entitlement to pay and other benefits must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles. * * * Applying these doctrines, courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel. These cases have involved, *inter alia*, promises of appointment to a particular grade or step level, promises of promotion upon satis-

> faction of certain conditions, promises of extra compensation in exchange for extra services, and promises of other employment benefits.

04-1225 Pet. App. 14a-15a (quoting *Kizas* v. *Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983), cert. denied, 464 U.S. 1042 (1984)); see, *e.g.*, *Schism* v. *United States*, 316 F.3d 1259, 1268, 1271, 1275-1275 (Fed. Cir. 2002) (en banc), cert. denied, 539 U.S. 910 (2003); *Kizas*, 707 F.2d at 535 (citing numerous cases). Instead of "transform[ing] the basic relationship between the United States and its" employees, as petitioners claim (04-1225 Pet. 12), the decision below therefore rests on established principles concerning that relationship. As federal employees, petitioners can have no contractual right to FLSA overtime compensation.

Indeed, petitioners can point to *no* contractual document that could even arguably give rise to such a right. As the Federal Circuit noted, "[t]he only legal instrument, the Form 50, rather than acknowledging [petitioners'] right to be paid for overtime at the rate specified in the FLSA, instead indicated that the FLSA did *not* apply to them." 04-1225 Pet. App. 17a (emphasis added).

Petitioners rely heavily (04-1225 Pet. 15) on *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131 (1885), which held that a local government had violated the Contracts Clause of the United States Constitution by not paying a district attorney money that he was concededly owed for his services. The Court reasoned that an "implied contract" arose between the locality and the employee because "[n]ot only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury." *Id.* at 134.

Petitioners' reliance on *Fisk* is misplaced for a number of reasons. As the court of appeals noted (04-1225 Pet. App. 14a), *Fisk* involved a local government employee's rights

under the Contracts Clause, not a federal employee's rights under the Takings Clause. Because the federal employment relationship is governed by statute, not contract, principles governing implied-in-fact contracts apply differently to the federal government. See pp. 12-13, *supra*; *Schism*, 316 F.3d at 1274; *Kizas*, 707 F.2d at 535 & nn.51-54 (citing cases).

Moreover, in *Fisk*, liability and damages had been determined, and the only question was whether the Contracts Clause applied and required the locality to levy a tax to pay the wages. 116 U.S. at 134-135. In contrast, the government has always disputed petitioners' right to FLSA compensation, and petitioners' claims still have not been resolved. Especially in this posture, there is no basis for converting petitioners' statutory claims for compensation into constitutional takings claims.

United States v. *Larionoff*, 431 U.S. 864 (1977), is inapposite for similar reasons. *Larinoff* considered the validity, under a statute, of administrative regulations that interpreted that statute to deny a re-enlistment bonus to a service member even though the bonus had been in effect at the time the service member signed a written re-enlistment agreement. *Id.* at 873. As the Federal Circuit and the CFC both noted, *Larionoff* is inapposite because it involved the interpretation of a statutory entitlement to compensation, not the assertion of a claim under the Takings Clause. 04-1225 Pet. App. 12a, 45a. Although *Larinoff* also noted that "serious constitutional questions would be presented" by a statute that deprived a service member of pay for services already performed (431 U.S. at 879), that statement is hardly a definitive resolution of the constitutional issue in this case. Indeed, the Court did not even refer to the Takings Clause. And like *Fink*, *Larinoff*

addressed a specific, known liability that turned only on the statutory issue addressed by the Court.

ii. In any event, while *Fink* and *Larinoff* addressed employees' rights to *compensation*, this case involves a *statute of limitations* for administrative claims. Although petitioners repeatedly contend (*e.g.*, 04-1225 Pet. 2-3; 04-1226 Pet. 25) that Congress repudiated its debts, and deprived them of compensation for work already performed, it did no such thing. Congress did not repeal the FLSA. Nor did it impair in any way petitioners' ability to pursue judicial remedies. Indeed, petitioners have pursued their judicial remedies with no interference from Congress. See generally p. 4, *supra*.

Instead, this case involves only a statute of limitations for an additional administrative claim avenue open only to government employees, and even that statutory limitations period is the same now as it was when petitioners performed the relevant work and filed their claims. It bears emphasis that the sole basis for petitioners' takings claim is that *after* petitioners performed the work at issue, and *after* petitioners filed their judicial and administrative claims, Congress first enacted a retroactive extension of the limitations period for administrative claims, and then enacted a partial repeal of that retroactive extension for employees who had already received overtime compensation for the work at issue. See, *e.g.*, 04-1225 Pet. 3 (relying on the amendment to Section 640). Taken together, those two statutes had no effect on petitioners' primary conduct and left petitioners no worse off (and in some respects better off) than when they performed the relevant work and filed their claims.[1]

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[1] Although petitioners challenged GAO's reconsideration of the appropriate limitations period in their prior petition for a writ of

Thus, even if petitioners had somehow obtained vested contract rights at the time they completed the relevant work, those vested rights would not have included Section 640's *subsequent* extension of the limitations period for administrative claims. That statute had not yet been enacted, and there are no vested rights in subsequently-conferred windfalls. In that respect, Section 640 is indistinguishable from other government benefits, such as social security benefits, that do not create vested property rights and are therefore subject to legislative repeal. See, *e.g.*, *Flemming* v. *Nestor*, 363 U.S. 603, 608 (1960) (holding that termination of social security benefits did not deprive petitioner of an accrued property interest).

b. i. In addition to asserting a contractual entitlement, petitioners contend (04-1225 Pet. 18-23) that a statutory right to compensation can give rise to a cognizable property interest. That contention fails because nothing in the statutory text evinces an intent to confer property rights. "For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-466 (1985) (quoting *Dodge* v. *Board of Educ.*, 302 U.S. 74, 79

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certiorari in this case (see Gov't Br. in Opp. at 22-23 & n.12, *Adams* v. *Hinchman*, No. 98-1265), the current petitions rely only on *Congress's* changes to the administrative statute of limitations. See, *e.g.*, 04-1225 Pet. 3. In any event, GAO's overruling of its prior interpretation of the Barring Act could not give rise to a takings claim because petitioners have no property interest in any particular construction of a statute. See pp. 20-21, *infra*. Moreover, GAO's current interpretation is the correct one. See 04-1225 Pet. App. 81a; *id.* at 61a; p. 5, *supra*.

(1937)). In determining whether a statute "clearly and unequivocally" overcomes that presumption, "it is of first importance to examine the language of the statute." *Id.* at 466 (quoting *Dodge*, 302 U.S. at 78).

Significantly, petitioners make no attempt to identify *any* language in *any* statute that could overcome that presumption in this case. Although petitioners base their claims on the partial repeal of Section 640, nothing in Section 640 expresses an intent by Congress to bind itself by conferring vested property rights on petitioners. Instead, that statute simply directed the Comptroller General to apply a six-year statute of limitations to certain administrative claims. See p. 6, *supra*.

ii. Instead of contesting that point, petitioners criticize various aspects of the court of appeals' reasoning. Those criticisms are misplaced. Petitioners argue (04-1225 Pet. 22-23) that the Federal Circuit erred in *another* case, *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1340 (2001) (en banc), cert. denied, 535 U.S. 1096 (2002), which held that "the mere imposition of an obligation to pay money * * * does not give rise to a claim under the takings Clause of the Fifth Amendment." That holding is correct. As this Court explained in *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), "[u]nlike real or personal property, money is fungible," and taxes and other government exactions might be considered takings if the mere imposition of an obligation to pay money, without more, implicated the Takings Clause.

As the court of appeals noted (04-1225 Pet. App. 19a-20a), a majority of this Court reiterated that conclusion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), by determining that a mere obligation to pay an undifferentiated amount of money, not drawn from a specific identifiable fund, is not property for purposes of the Takings

Clause. *Id.* at 540-542 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 554-557 (Breyer, J., dissenting).[2] Although petitioners fault the Federal Circuit for "[t]allying votes from concurring and dissenting opinions" (04-1225 Pet. 22), that misses the point. *Commonwealth Edison* did not treat *Eastern Enterprises* as a change in the law; nor did it rely exclusively on *Eastern Enterprises*. Instead, the Federal Circuit also relied on this Court's decision in *Sperry*, *supra*, and the Federal Circuit's own decision in *Atlas Corp.* v. *United States*, 895 F.2d 745, 756, cert. denied, 498 U.S. 811 (1990), which had held that "[r]equiring money to be spent is not a taking of property." *Commonwealth Edison*, 271 F.3d at 1340.

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[2] The takings issue in this case is not distinguishable from *Eastern Enterprises* on the basis, asserted by petitioners (04-1225 Pet. 23), that *Eastern Enterprises* involved a private party's obligation to another private party, whereas this case involves an obligation to pay money by the government. Justice Kennedy expressly rejected the relevance of that point in *Eastern Enterprises*: "The circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking." 524 U.S. at 543 (Kennedy, J., concurring in judgment and dissenting in part). The four other Justices who agreed that no valid taking claim was raised in *Eastern Enterprises* did remark that the case involved an obligation to pay money to a private party. See *id.* at 555 (Breyer, J., dissenting). They also observed, however, that one of the reasons that the monetary obligation in *Eastern Enterprises* should not be conceptualized as a taking is that such a characterization might lead to the conclusion that all taxes could be considered takings. See *id.* at 556 (Breyer, J., dissenting).

Nor is the relevance of *Eastern Enterprises* limited to regulatory takings, as petitioners suggest (04-1225 Pet. 20-21). The relevant portions of *Eastern Enterprises* address the question whether the plaintiff had a cognizable property interest—a threshold issue in *any* takings case. See 524 U.S. at 540-542 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 554-556 (Breyer, J., dissenting); p. 11, *supra*.

There is nothing wrong with a lower court following *both* past precedent *and* the expressed views of a majority of the Members of this Court. In any event, this Court denied certiorari in *Commonwealth Edison* (535 U.S. 1096 (2002)), and further review of that decision is no more warranted in this case than in that one. See generally Gov't Br. in Opp. at 13-15, *Sacramento Mun. Util. Dist.* v. *United States*, Nos. 01-1020, 01-1155, 01-1398 & 01-1411.

Indeed, petitioners simply misread the Federal Circuit's decision in contending (04-1225 Pet. 24) that the court held that debts are not property unless they relate to a specific "fund of money." The Federal Circuit expressly stated that *contractual* obligations are ordinarily property. 04-1225 Pet. App. 15a-16a. In the discussion relied on by petitioners, the court held that the mere imposition of an obligation to pay money does not constitute a taking of a specific interest in property, and then recognized, as had a majority of this Court in *Eastern Enterprises*, that nonetheless the seizure of a specific fund of money can constitute a taking if the fund constitutes a specific interest in property. *Id.* at 21a; *Eastern Enters.*, 524 U.S. at 555 (Breyer, J., dissenting); see *id.* at 540 (Kennedy, J., concurring in judgment and dissenting in part).

That result follows from *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies*, *supra*, which held that interest on bank deposits could not be taken without just compensation because the depositors had a property interest in their deposits, and the right to interest follows the right to principal under state property law. Those cases are of no avail to petitioners, however, because they rest on state-law property interests in the seized funds. *Phillips*, 524 U.S. at 165-167; *Webb's*, 449 U.S. at 160-161. As explained above, petitioners have no property interest of any kind in Section

640's extension of the limitations period for administrative claims.

Petitioners similarly take issue (04-1225 Pet. 22) with the Federal Circuit's determination that *Commonwealth Edison* supports its "conclu|sion| that a statutory right to be paid money, at least in the context of federal employee compensation and benefit entitlement statutes, is not a property interest for purposes of the Takings Clause." 04-1225 Pet. App. 22a. For the reasons explained above, however, the federal employment relationship is statutory, not contractual, and petitioners can point to nothing in the relevant statutes that expresses an intent to vest petitioners with property rights. See pp. 12-13, 17, *supra*.

c. For similar reasons, petitioners err in asserting (04-1225 Pet. 25-26) that their administrative claims are "property even if not yet reduced to judgment." As the Federal Circuit explained, a cause of action can provide the basis for a takings claim only when "the cause of action protects a legally-recognized property interest." 04-1225 Pet. App. 23a. Petitioners cannot generate a property interest merely by asserting a cause of action.

The reason is straightforward: although a cause of action is considered property for some purposes, "it is inchoate and affords no definite or enforceable property right until reduced to final judgment." *Austin* v. *City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988) (internal quotation marks omitted). As this Court has explained, "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Cent. R.R.* v. *White*, 243 U.S. 188, 198 (1917). Thus, new legislation—including legislation repealing a provision of law on which the plaintiff had relied—generally applies to pending cases. *Plaut* v. *Spend-thrift Farm, Inc.*, 514 U.S. 211, 226-227 (1995); *Western Union Tel. Co.* v.

Louisville & Nashville R.R., 258 U.S. 13, 22 (1922). Because petitioners have not obtained a final judgment on any of their claims, their assertion of a cause of action does not give them property rights in any particular rule of law, including any particular limitations period for their administrative claims. Indeed, as the court of appeals noted, petitioners "have not cited any precedent finding such a property interest in a claim of Government liability before an administrative agency." 04-1225 Pet. App. 23a.

d. Petitioners err in contending (04-1225 Pet. 22 n.21) that there is a relevant "circuit split over the precedential status of *Eastern Enterprises*." Petitioners contend (*ibid.*) that the Federal Circuit and the First Circuit have "held that *Eastern Enterprises* has precedential effect on Takings Clause claims," while other circuits have held that "*Eastern Enterprises* either has no precedential effect, or that its holding is limited to similarly-situated plaintiffs."

To whatever extent there is any disagreement among the lower courts about how to apply the analysis of *Marks* v. *United States*, 430 U.S. 188 (1977), to *Eastern Enterprises*, it does not provide any basis for granting these petitions. The Federal and First Circuits both relied in part, but not in whole, on *Eastern Enterprises* for principles that were already settled. As explained above, the Federal Circuit relied on *Eastern Enterprises* for the proposition, previously announced in decisions of this Court and the Federal Circuit, that the mere imposition of an obligation to pay money is not a taking. See pp. 17-18, *supra*. Similarly, the First Circuit relied on *Eastern Enterprises* and two of its own prior decisions for the proposition that "a Takings Clause issue can arise only after a plaintiff's property right has been independently established." *Parella* v. *Retirement Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1999); see *id.* at 59. That is a

bedrock proposition of settled takings jurisprudence mandated by the express text of the Takings Clause itself. See p. 11, *supra*.

There is no meaningful conflict among the circuits. No circuit has squarely held that *Eastern Enterprises* changed the law, or dictated a result that the court otherwise would not have reached. More importantly, no courts of appeals have disagreed about how to apply *Eastern Enterprises* to any particular question at issue in this case. Indeed, petitioners point to no specific difference in the courts' application of *Eastern Enterprises* to *any* issue, much less to an issue that is relevant to the disposition of this case.[3]

2. In addition to challenging the Federal Circuit's decision, petitioners assert (04-1226 Pet. 14-25; 04-1225 Pet. 27-28) that the D.C. Circuit erred in holding that the 1995 amendments do not violate the Due Process Clause. This Court previously denied a petition challenging the D.C.

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[3] The other cases cited by petitioners as the basis for the supposed circuit split involved the constitutionality of either the Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. 9701 *et seq.* (the statute at issue in *Eastern Enterprises*) or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* None of those cases involved statutes of limitations, employee compensation, or alleged government contracts, and none of them held that a taking had occurred. See *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 188-190 (2d Cir. 2003) (holding that CERCLA is constitutional), cert. denied, 540 U.S. 1103 (2004); *Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 550-553 (6th Cir. 2001) (same); *A.T. Massey Coal Co., Inc.* v. *Massaranti*, 305 F.3d 226, 236-241 (4th Cir. 2002) (holding that the Coal Industry Retiree Health Benefits Act of 1992 is constitutional as applied in that case), cert. denied, 538 U.S. 1012 (2003); *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 169-174 (3d Cir.) (same), cert. denied, 528 U.S. 1003 (1999); *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1253-1258 (D.C. Cir. 1998) (same).

Circuit's judgment in this case (526 U.S. 1158 (1999)), and it should do so again. The D.C. Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals.

a. Petitioners argue (04-1226 Pet. 15) that every Member of this Court agreed in *Eastern Enterprises* that "the Fifth Amendment requires more from retroactive legislation than a rational basis," and instead requires "a searching inquiry into the fundamental fairness of the burdens imposed by a law." Petitioners overread the opinions in *Eastern Enterprises*.

i. As the court of appeals recognized (04-1225 Pet. App. 61a), this Court has consistently held that retroactive legislation complies with due process principles if "the retroactive application of the legislation is * * * justified by a rational legislative purpose." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); accord *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992); *Sperry*, 493 U.S. at 64; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 17-18 (1976). Indeed, even though petitioners assert that *Gray*, *Sperry*, and *Turner Elkhorn* "strongly suggest" that rationality is not the appropriate test, they ultimately concede that "[t]he test actually articulated in these cases * * * is the ordinary rational basis standard." 04-1226 Pet. 15 & n.9.

Eastern Enterprises did not overrule those settled precedents. Rather, the four-Justice plurality in that case confirmed that to prevail on a due process theory, a plaintiff must show that retroactive legislation is "arbitrary and irrational." 524 U.S. at 537 (plurality opinion) (quoting *Turner Elkhorn*, 428 U.S. at 15). Justice Kennedy, who concurred in the judgment and dissented in part, applied that traditional rational-basis test by stating that "due process requires an inquiry into whether in enacting the

retroactive law the legislature acted in an arbitrary and irrational way," and he concluded that the legislation at issue there bore "no legitimate relation to the interest which the Government asserts in support of the statute." *Id.* at 547, 549; see *id.* at 547 (noting that those "[a]ccepted principles" were "sufficient to dispose of the case").[1] Justice Breyer's dissent similarly explains that the Due Process Clause "safeguards citizens from arbitrary or irrational legislation." *Id.* at 556.

Moreover, petitioners err in attempting to draw a sharp distinction between rationality and fairness. It is precisely because "[r]etroactive legislation presents problems of unfairness" that such legislation must further "a legitimate legislative purpose * * * by rational means." *Romein*, 503 U.S. at 191. Thus, when Justice Breyer explained in his *Eastern Enterprises* dissent that "as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary," 524 U.S. at 557, he was simply stating that fair-ness can be relevant to rational-basis review. Significantly, petitioners cite *no* decision of *any* court that has adopted their novel view of *Eastern Enterprises* or the Due Process Clause.

ii. In any event, the legislation at issue here, which retroactively changed a retroactive change, would satisfy

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[1] Although Justice Kennedy has described his separate opinion in *Eastern Enterprises* as calling for "heightened scrutiny for retroactive legislation under the Due Process Clause," *Kelo* v. *City of New London*, No. 04-108, 2005 WL 1469529, at *12 (June 23, 2005) (Kennedy, J., concurring), that statement apparently refers to the traditional rational-basis scrutiny applicable to all retroactive legislation, because Justice Kennedy has also emphasized that the standard he advocated in *Eastern Enterprises* is "permissive" and violated only in "rare instances." *Lingle* v. *Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2087 (2005) (Kennedy, J., concurring) (quoting *Eastern Enters.*, 524 U.S. at 550 (opinion of Kennedy, J.)).

any plausible legal standard. Petitioners do not deny that Congress had a rational basis for amending Section 640. As the lower courts explained, Congress rationally concluded that it should equalize the limitations period for most public and private sector workers filing FLSA overtime claims, both out of "fairness" and in light of competing demands on the federal budget. 04-1225 Pet. App. 61a, 83a-85a.

Petitioners' contentions regarding fundamental fairness ignore the context of the legislation. It was only *after* petitioners filed their administrative claims that Congress enacted the two relevant statutes. The first statute retroactively extended the limitations period for such claims; the second partially repealed that retroactive extension as applied to workers who had already received some overtime compensation for the hours at issue. See pp. 5-6, *supra*. Although petitioners focus solely on the second statute, the combined effect of the two retroactive statutes was to leave petitioners no worse off (and in some respects better off) than when they performed the relevant work and filed their claims. There is nothing "fundamentally unfair" about that.

b. Petitioners nonetheless assert that laws shortening statutes of limitations are "essentially *per se* violations of Due Process unless they provide a reasonable prospective grace period in which claimants who would otherwise be barred can file their claims." 04-1226 Pet. 21; see *id.* at 22 & n.12 (citing, *e.g.*, *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 n.23 (1983)). That contention has nothing to do with this case because the 1994 and 1995 statutes only affected claims that had already been filed. The 1994 legislation was expressly limited to "claims filed before June 30, 1994" (three months before the statute's enactment), and the 1995 legislation only repealed in part the 1994 legislation. See pp. 5-6, *supra*. Because Congress expressly limited the statutes to already-filed

claims, a grace period for unfiled claims would have been meaningless.

Moreover, all of the cases on which petitioners rely involve limitations periods for judicial claims. It is far from clear that Congress is similarly constrained in adjusting the limitations period for administrative filings while leaving the period for substantially identical claims in a judicial forum wholly unaffected, particularly where its purpose is to correct past mistakes and it leaves the "net" limitations period for administrative claims essentially the same. See generally *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378-379 (1940); *Graham* v. *Goodcell*, 282 U.S. 409, 429 (1931).

c. Petitioners' contention (04-1226 Pet. 23) that "it is a *per se* violation of the Fifth Amendment for the United States to abrogate its own debts," is likewise misplaced. Indeed, that argument merely repackages petitioners' takings claims in due process terms. Petitioners rely on cases that involved challenges to the government's legislative repudiation of specific contractual agreements, such as agreements to redeem bonds or pay insurance proceeds. See *id.* at 22-23 (citing, *e.g.*, *Perry*, *supra*; *Lynch*, *supra*). Those cases are irrelevant because the retroactive repeal of the retroactive extension of the administrative limitations period at issue here did not violate any contract, as explained above. See pp. 12-16, *supra*.[5]

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[5] There is no property interest that could give rise to a due process claim in this case because, as explained above, petitioners had no property interest in Section 640's retroactive extension of the limitations period for administrative claims. See pp. 12-21, *supra*. As the D.C. Circuit recognized, however, that question need not be reached in this case, because even assuming *arguendo* that the Due Process Clause is implicated, Congress's amendment of Section 640 satisfies rational basis review. See 04-1225 Pet. App. 61a; p. 25, *supra*.

3. Petitioners' contention (04-1225 Pet. 28-29) that "[t]his case presents questions of great national importance" rests on their mistaken premise that "[t]he Federal Circuit held that the United States can retroactively abrogate its obligations." The practical significance of this case is likely limited to government employees, because government contractors and others who do business with the government typically enter into contractual relationships with the government, and are therefore protected by the Takings Clause. See p. 12, *supra*. Even with respect to the affected government employees, the combined effect of the 1994 and 1995 legislation was to give petitioners *greater* rights than they would have had under the statutes in effect at the time they performed the relevant work and filed their claims. See p. 15, *supra*. Thus, the government has not sought to abrogate its debts, as petitioners repeatedly contend (*e.g.*, 04-1225 Pet. 2-3; 04-1226 Pet. 25).

In contrast, petitioners' position would deprive Congress of needed flexibility, because it would mean that Congress could not unilaterally extend a benefit with confidence that it could later withdraw that benefit in light of changed circumstances or second thoughts. That could make Congress less inclined to extend new benefits, and it would represent a significant intrusion into Congress's authority to legislate in the public interest.

Petitioners' contentions (04-1226 Pet. 12, 13) that the combined holdings of the Federal and District of Columbia Circuits produce an "egregious whipsaw," and lead to a result that no member of the *Eastern Enterprises* Court would have approved, is particularly misplaced. If Congress had actually sought to extinguish its obligation to pay earned wages to federal employees, a more difficult due process question would be presented, and the fairness concerns raised by the concurring and dissenting opinions

in *Eastern Enterprises*—concerns that were expressed in the context of rational-basis review, see pp. 23-24, *supra*—would be more pronounced. But nothing in any of the *Eastern Enterprises* opinions can reasonably be read to suggest that Congress can not retract an administrative benefit it unilaterally provided *after* the relevant work had been completed.

Although petitioners note that the Federal Circuit has exclusive jurisdiction over some takings claims (04-1225 Pet. 29-30), that circuit does not have exclusive jurisdiction over all takings challenges to government actions. See, *e.g.*, *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 428, 430 (3d Cir. 2004) (adjudicating takings challenges to administrative regulation), cert. denied, No. 04-1020, 2005 WL 229245 (June 13, 2005); *Pittston Co.* v. *United States*, 368 F.3d 385, 405-406 (4th Cir. 2004) (adjudicating takings challenge to statute), cert. denied, 125 S. Ct. 1589 (2005). Nor does the Federal Circuit have exclusive jurisdiction over takings claims generally, as petitioners' allegation of a circuit split on the takings issue demonstrates. See 04-1225 Pet. 22 & n.21 (citing decisions from seven circuits). Due process issues likewise arise in the regional circuits, as shown by the D.C. Circuit's adjudication of petitioners' due process claim. Thus, the absence of a circuit split weighs strongly against further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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In the Supreme Court of the United States

STEPHEN S. ADAMS AND 14,302 OTHER SIMILARLY SITUATED PLAINTIFFS,

PETITIONERS,

V.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Petitioners have addressed the Takings issues in a separate reply filed in No. 04-1225, and respectfully suggest that this Court review that reply first.

On the Due Process issues, the brief in opposition engages in an elaborate semantic game. As the petition explained, five Justices of this Court agreed in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), that laws imposing severely retroactive burdens violate Due Process unless they are fundamentally fair. Because the other four Justices would have held that such laws are regulatory Takings under a similar fairness analysis, this Court *unanimously* agreed that fundamentally unfair retroactive laws are unconstitutional. The United States concedes this, as it must. It nonetheless insists that *Eastern Enterprises* did not change the law in any respect, and that therefore there is no jurisprudential uncertainty for this Court to clarify, because such "fundamental fairness" scrutiny is nothing more than ordinary rational basis review. Opp. 23-24.

That conclusion is untenable. Although Justice Kennedy and the dissenting Justices in *Eastern Enterprises* explained that the test they applied could be reconciled with this Court's prior Due Process precedents, that analysis plainly was not rational basis review as it is conventionally understood. Indeed, the opposition is forced to concede in a footnote that just a few weeks ago Justice Kennedy described the test he applied in *Eastern Enterprises* as "'heightened scrutiny for retroactive legislation under the Due Process Clause.'" Opp. 24 n.4 (quoting *Kelo v. City of New London*, No. 04-108, 2005 WL 1469529, at *12 (U.S. June 23, 2005) (Kennedy, J., concurring)). The ordinary rational basis test as understood and applied by this Court and the lower courts asks only whether the law is *rationally* related to some legitimate state purpose. Fundamentally unfair retroactive legislation abrogating the United States's

debts is always *rational*—since it saves the government money.

The petition also pointed out that ordinary rational basis review should not have been applied in this case for two independent reasons. First, this Court has consistently held that laws retroactively shortening limitations periods are *per se* Due Process violations unless they provide a grace period for claims not yet filed. The United States's only response is that a grace period would have been useless here because these claims had already been filed. That assertion is outrageous. If retroactively reducing a limitations period violates Due Process unless potential claimants are given a fair chance to file, then retroactively barring claims *that have already been filed* is an even more glaring violation.

Second, the petition pointed out that the deference implicit in ordinary rational basis review is inappropriate when the principal (or, as in this case, exclusive) effect of legislation falls upon the United States's own proprietary obligations. On that point the brief in opposition simply relies on its Takings arguments, which petitioners have discussed in detail in their separate reply in 04-1225.

Petitioners submit that, under the appropriate heightened standard of review, the 1995 statute retroactively shortening their limitations period violated Due Process. Regardless, the obvious confusion about the appropriate standard merits review by this Court.

1. The United States argues (Opp. 23-24) that the reasoning of Justice Kennedy and Justice Breyer in *Eastern Enterprises* is fully consistent with prior Due Process law, because they concluded that "a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary," 524 U.S. at 557 (Breyer, J., dissenting), and this Court has always said that a law that is "arbitrary and irrational" violates Due Process, *e.g.*, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The problem

with such reasoning is that, although there were certainly hints of fundamental fairness review in this Court's prior retroactivity cases, the meaning that this Court actually gave to the phrase "arbitrary and irrational" was that a law passes muster so long as it is rationally related to a legitimate state purpose. *See* Pet. at 14-15 n.9.[1] That is certainly how the lower courts have understood the phrase, and it is the test that the D.C. Circuit applied in this case.

The opposition protests that there is no "sharp distinction between rationality and fairness," Opp. 24, but that is either plainly incorrect or another semantic exercise. If by "rationality" the United States means the conventional "rationally related to a legitimate state purpose" test, the distinction is razor sharp. A law is rationally related whenever it may advance a legitimate state purpose—*i.e.*, so long as it is not obviously incompetent or totally unrelated to any conceivable legitimate purpose. That is why judicial decisions invalidating economic legislation under the rational basis test are so extraordinarily uncommon. But laws can be *effective* without being *fair*.

The facts of *Eastern Enterprises* demonstrate the distinction. Congress's stated intention, providing health benefits to coal industry retirees, was certainly legitimate. And the means Congress chose to achieve its objective, imposing financial liability on former employers of the retirees, was a rational and effective means to that end. If the ordinary rational basis test had applied, that would have ended the analysis. Instead Justice Kennedy emphasized that Eastern "was not responsible for [the retirees'] expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy." *Eastern Enterprises*, 524 U.S. at 550

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[1] "Pet." references in this reply refer to petition No. 04-1226, while "Pet." references in petitioners' other reply refer to petition No. 04-1225.

(Kennedy, J., concurring). And the dissenters asked whether the Coal Act, effective or not, was an "unfair allocation of public burdens ...." *Id.* at 558 (Breyer, J., dissenting).

Justice Kennedy and the dissenters in *Eastern Enterprises* argued that none of this Court's prior opinions would have to be overruled in order to announce a fundamental fairness test of that nature for retroactive legislation. And the United States seems to have embraced that test, at least for purposes of this case. But the lower courts do not have the liberty to follow hints woven through this Court's opinions; until this Court holds otherwise, they remain bound by the ordinary rational basis test that takes no account of fairness concerns. Although the opposition chides petitioners for "cit[ing] *no* decision of *any* court that has adopted their novel view of *Eastern Enterprises* or the Due Process Clause," Opp. 24, that was precisely petitioners' point. If the fundamental fairness analysis embraced unanimously by the Justices of this Court in *Eastern Enterprises* is to become the law, it will require a decision from this Court that (unlike *Eastern Enterprises* itself) actually contains such a holding.

2. There is of course room for reasonable disagreement about what Due Process and Takings law are or should be in the wake of *Eastern Enterprises*. The whipsaw currently at work in the lower courts, however, makes no sense at all. The Federal Circuit has built an entire jurisprudence of monetary Takings around the proposition that five Justices of this Court concluded in *Eastern Enterprises* that no law "impos[ing] an obligation to pay money" can be a Taking. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002). But the reasoning of those five Justices under the Takings Clause was inextricably intertwined with their conclusion that fundamental fairness review would be available under

the Due Process Clause. Indeed, as petitioners explained in their Takings petition (04-1225, at 20-23), the best way to understand the conclusions of Justice Kennedy and the dissenters in *Eastern Enterprises* is that regulatory Takings scrutiny under the test in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), would have been essentially redundant in light of the Due Process analysis they employed. And since the lower courts have (properly) declined to find any binding Due Process holding in *Eastern Enterprises*, the fact that the Federal Circuit has (improperly) found a Takings holding there opens the door to absurd consequences. For example, if it were challenged tomorrow the Coal Act itself would be immune from Takings scrutiny in the lower courts and would be subjected to nothing more searching than minimum rationality review (which it surely passes) under the Due Process Clause.

The United States protests that the Federal Circuit's jurisdiction over Takings claims is not quite exclusive. Opp. 28. But the Federal Circuit does have exclusive jurisdiction over substantial Takings claims for monetary compensation against the United States. Since the United States itself insists that the Federal Circuit's holding in this case is "likely limited to [federal] government employees," Opp. 27, it cannot credibly contend that this confusion will be resolved by non-federal cases in other circuits without this Court's intervention.

3. Petitioners believe that the best way to harmonize Due Process and Takings jurisprudence in this area would be to hold that laws abrogating the United States's financial obligations are *per se* Takings. If this Court chooses to apply a fundamental fairness test under the Due Process Clause, however, it should hold that the 1995 amendment to Section 640 denied petitioners Due Process.

The opposition concedes that "if Congress had actually sought to extinguish its obligation to pay earned wages to federal employees, . . . the fairness concerns raised by the concurring and dissenting opinions in *Eastern Enterprises* . . . would be more pronounced." Opp. 27-28. That is exactly what Congress both sought to do, and did. Congress identified a significant sum of money that the United States owed to petitioners ($460 million according to Rep. Lightfoot), determined that it would not honor this obligation "for work done many years ago," 141 Cong. Rec. 32,597 (1995), and therefore modified the statute of limitations to extinguish petitioners' claims. The fact that Congress chose to avoid its obligation by reducing the statute of limitations instead of by canceling the underlying debt is immaterial. As explained in petitioners' separate reply in 04-1225, at 7-8, abrogating a debt and rendering it unenforceable are identical for Takings purposes.

Under the standards for retroactive legislation articulated by Justice Kennedy and the dissenters in *Eastern Enterprises*, the 1995 statute also violates Due Process.[2] That statute was not remedial in any sense, because petitioners did not owe anything to the United States that required compensation. In the same vein petitioners were in no sense responsible for the budgetary shortfall that the statute sought to remedy. The effect of the 1995 amendment was undoubtedly severe, in that it nullified a lawful debt of the United States to petitioners for unpaid wages for work already performed. It therefore represents "an unfair allocation of public burdens through

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[2] Petitioners acknowledge that Section 640 would survive ordinary rational basis scrutiny. To further the "legitimate" legislative purpose of achieving a $460 million cost savings for the treasury, Congress took the "rational" step of identifying the debt obligation owed to petitioners and modifying the statute of limitations in order to eradicate that debt.

.... specially arbitrary retroactive means." *Eastern Enterprises*, 524 U.S. at 558 (Breyer, J., dissenting).

The opposition argues that the amendment was fair because it equalized the limitations period for private and public sector employees. That is far too simplistic. There are many differences between government and private employment, and private sector employees have the better of those differences on many points. But, as part of the overall package that induced them to work for the United States, petitioners were given an administrative process and assured by GAO and OPM that they would have six years to seek any unpaid overtime through that process. Even if that assurance was wrong, and the limitations period did run on petitioners' claims, Congress and the President recognized the patent injustice involved and agreed to honor claims already filed notwithstanding the limitations bar. It has been settled contracts law for centuries that a promise to honor a debt otherwise barred by a statute of limitations is binding, even in the absence of consideration, and cannot be revoked. *See* Reply to 04-1225, at 3-4 & n.2. Fundamental fairness requires the same result here.

4. Petitioners also pointed out (Pet. 22 n. 12) that laws retroactively shortening a statute of limitations are *per se* Due Process violations unless they provide a reasonable grace period for claims that have not yet been filed. The opposition concedes such settled law, but argues that since the retroactive amendment here was "limited ... to already-filed claims, a grace period for unfiled claims would have been meaningless." Opp. 25-26. That argument completely misses the point. The thrust of cases like *Atchafalaya Land Co. v. F.B. Williams Cypress*, 258 U.S. 190 (1922), is that claimants rely on limitations periods when deciding when to file their claims—and therefore it is profoundly unfair to shorten a limitations period without sufficient notice to those that have not yet filed. Retroactively shortening the

period for those who *have already filed*, and dismissing their claims on that basis, is far worse, not better. If a grace period of zero is *per se* unconstitutional, a grace period of *minus four years* is an outrage. That is exactly what happened here.

The opposition also suggests that the *Atchafalaya* principle should not be extended to limitations periods in administrative proceedings, but the cases it cites are not germane. Opp. 26. And the basic point underlying *Atchafalaya* is equally true in administrative proceedings as in court. Assuring someone that they have a certain period in which to vindicate their rights, and then pulling the rug out from under them by changing the rules retroactively, is unfair in any federal forum.

5. The petition also explained that the deference to legislative judgment implicit in the rational basis test is inappropriate "where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations." *United States v. Winstar Corp.*, 518 U.S. 839, 898 (1996) (plurality op.); Pet. 22-24. The opposition's only response is to argue that the 1995 amendment did not affect any contractual obligation of the United States. That is incorrect for reasons explained in detail in petitioners' separate reply on the Takings issues. Petitioners *do* have contractual rights against the United States, under unilateral contract principles familiar to first year law students and explained by this Court in *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885).

But even setting aside whether the *Winstar* principle applies directly to this case, petitioners' broader point was that the practical problem this Court struggled with in *Winstar* under contracts law is remarkably similar to the problems posed here under the Fifth Amendment. Many regulatory measures, including changes to limitations periods, will have an incidental effect on the government's

own obligations as well as on myriad private obligations. Usually the government is entitled to the same deference as to the "public and general" character of those measures that it gets for all legislation. *Winstar*, 518 U.S. at 899 (plurality op.). But when the principal—or, as in this case, *exclusive*—consequence of a statute is to relieve the government of the burden of its own financial obligations for goods or services already received, such deference is misplaced.

6. The opposition argues that forcing the United States to honor its debts "would deprive Congress of needed flexibility, because it would mean that Congress could not unilaterally extend a benefit with confidence that it could later withdraw that benefit in light of changed circumstances or second thoughts." Opp. 27. If the United States is talking about government benefits like social security then that argument is a red herring. Petitioners agree that such benefits may be withdrawn prospectively in light of changed circumstances, and nothing about their argument is inconsistent with that principle. If the United States means that it needs the "flexibility" to later renege after promising to honor a debt otherwise barred by a statute of limitations, the answer (again) is that contract law resolved long ago that such promises *are not* revocable.

If the United States means that it needs the "flexibility" to decide whether to pay its employees for work already performed and accepted, then it is profoundly mistaken. One of the great benefits of the Fifth Amendment is that it gives the federal government the valuable flexibility *to make binding commitments*. If the United States cannot make promises and be bound by them like any private citizen, then the "certain result" will be to "undermin[e] the Government's credibility at the bargaining table and increase[e] the cost of its engagements." *Winstar*, 518 U.S. at 884 (plurality op.); *see also Lynch v. United States*, 292 U.S. 571, 580 (1934) ("Punctilious fulfillment of contractual

obligations is essential to the maintenance of the credit of public as well as private debtors."); *Sinking-Fund Cases*, 99 U.S. (9 Otto) 700, 720–21 (1879). The Framers understood the short-term temptation to abrogate public financial obligations, and the Fifth Amendment is a protection against behavior that they understood to be both immoral and potentially disastrous to the government's own long-term financial credibility.

This case presents this Court with an opportunity to drain the jurisprudential swamp that has grown up around its divided decision in *Eastern Enterprises*, and to clarify the relationship between the Due Process and Takings Clauses when governmental monetary obligations are at stake. Certiorari should be granted.

CONCLUSION

Either the separate petition addressed to the Federal Circuit should be granted in its entirety, or both petitions should be granted and consolidated for argument.

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